TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 153

NORTON R. GANGER, L. C. BETHART, THOMAS B. HAMILTON, ET AL., APPELLANTS,

vs.

CITY OF MIAMI, A MUNICIPAL CORPORATION IN DADE COUNTY, EXISTING UNDER THE LAW OF THE STATE OF FLORIDA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

FILED JULY 3, 1956

PROBABLE JURISDICTION POSTPONED OCTOBER 15, 1956

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

In Chancery No. 159201

THOMAS B. HAMILTON and JANE Q. HAMILTON, his wife, and HUNTER LYON, INC., a Florida corporation, Plaintiffs,

v.

THE CITY OF MIAMI, a municipal corporation in Dade County, existing under the laws of the State of Florida, Defendant.

AMENDED COMPLAINT—Filed December 2, 1953

Thomas B. Hamilton and Jane Q. Hamilton, his wife, and Hunter Lyon, Inc., a Florida corporation, for themselves and on behalf of all other persons similarly situated, sue the City of Miami, a municipal corporation incorporated under the laws of the State of Florida, and allege that:

1.

This complaint is brought for the purpose of invalidating certain special assessment liens which the Defendant attempted to impose against the property of the Plaintiffs, as well as of those in whose behalf the suit is brought, and, in the case of those who have paid the assessments, to recover back for them the money which they so paid. The assessments so laid by the City are against the property abutting on the following streets and avenues:

NE 1st Avenue from SE 2nd Street to NE 14th Street

NE 2nd Avenue from Flagler Street to 41st Street

[fol. 2] NW and SW 3rd Avenue from SW 1st Street to NW 20th Street

South Miami Avenue from S.W. 1st Street to SW 15th Road

North Miami Avenue from Flagler Street to NW 20th Street

NW 2nd Avenue from NW 20th Street to NW 36th Street

SW 17th Avenue from Flagler Street to Tamiami Trail

2.

The Plaintiffs, Thomas B. Hamilton and Jane Q. Hamilton, having paid no part of the assessments against their property, sue as the representatives of all other property owners similarly situated. The Plaintiff, Hunter Lyon, Inc., has paid the assessments imposed against its property and sues as a representative of all other property owners similarly situated. These Plaintiffs bring this suit for the benefit of all persons against whose properties the assessments herein complained of have been made, including those who have paid no part of said assessment, those who have paid a part, and those who have paid all of the assessments against their properties.

3.

A map showing a portion of the City of Miami, including the streets and avenues described in Paragraph 1 is attached hereto and made a part hereof.

4.

On March 1, 1950, the Defendant City passed and adopted Resolution No. 22277 in words and figures as follows:

Resolution Number 22277

Highway Improvements H-477 District
A Resolution Ordering Local Improvement H-477

Be It Resolved by the City Commission of the City of Miami:

That a local improvement, described and designated as follows, shall be made under Section 56 of the City Charter:

Highway Improvement H-477 as follows:

[fol. 3] On: N.E. 1st Avenue from S.E. 2nd Street to N.E. 14th Street

N.E. 2nd Avenue from Flagler Street to 41st Street

N.W. and S.W. 3rd Avenue from S.W. 1st Street to N.W. 20th Street

South Miami Avenue from S.W. 1st Street to S.W. 15th Road

North Miami Avenue from Flagler Street to N.W. 20th Street

N.W. 2nd Avenue from N.W. 20th Street to N.W. 36th Street

S.W. 17th Avenue from Flagler Street to Tamiami Trail

For resurfacing of existing asphaltic concrete pavement with a fifty pound (50#) asphalt concrete leveler course and one inch (1") asphaltic concrete wearing surface, including necessary intersection returns and intersections.

The property against which special assessments for the cost thereof shall be made is hereby designated District H-477.

Passed And Adopted this 1st day of Mar. 1950.

5.

The foregoing resolution was not published.

6.

Thereafter, Defendant caused to be published in the classified advertising section of the Miami Herald the following notice:

Notice of Local Improvement

Highway Improvement District H-477

All interested will take notice that at a meeting of the City Commission at 9:30 o'clock A.M. March 15th,

1950, their objections will be heard to the confirmation of Resolution No. 22277, adopted March 1st, 1950, ordering paving improvements on the following avenues, to-wit:

N.E. 1st Avenue, from S.E. 2nd Street to N.E. 14th Street;

N.E. 2nd Avenue, from Flagler Street to 41st Street;

N.W. and S.W. 3rd Avenue, from S.W. 1st Street to N.W. 20th Street;

South Miami Avenue, from S.W. 1st Street to S.W. 15th Road;

[fol. 4] North Miami Avenue, from Flagler Street to N.W. 20th Street;

N.W. 2nd Avenue, from N.W. 20th Street to N.W. 36th Street;

S.W. 17th Avenue, from Flagler Street to Tamiami Trail

Designated Improvement H-477.

Plans, specifications and estimate of cost of said improvement are on file in the City Clerk's office.

F. L. Correll, City Clerk.

Said notice was published one time in the issue of said paper published on March 4, 1950. A photostatic copy of the page of the paper containing said advertisement is attached hereto marked Exhibit 2 and made a part hereof.

7.

At the time of the adoption of Resolution 22277, and at the present time, the streets described in Highway Improvement District H-477 were main thoroughfares of the City of Miami. These streets had originally been paved, at the expense of the abutting property owners, and the paving had been laid with sufficiently suitable and durable surface to enable all abutting property owners to obtain ingress

and egress to and from their several properties and to afford reasonable use by the general public. The streets in said highway improvement district were not reasonably in need of being resurfaced, and it was not necessary to do the work thereon which the Defendant City subsequently performed and for which it thereafter imposed special assessment liens on the abutting properties.

8.

None of the Plaintiffs or those on whose behalf this suit is brought, became aware of any physical conditions existing on the streets and avenues abutting on their several properties which would justify the Defendant City in resurfacing the streets and charging the cost thereof against the abutting property owners, and not being sufficiently [fol. 5] informed either by Resolution 22277 or the Notice of Local Improvement described in Paragraph 6 above, neither the Plaintiffs nor those for whom this suit is brought filed objections as specified in said Notice.

9.

If, in fact, the streets in Highway Improvement District H-477 were in need of resurfacing, it was not for the purpose of affording the Plaintiffs ingress and egress to and from their several properties, nor to permit the general public to use such streets and avenues in a reasonable way, but it was to facilitate the use of said streets by the buses of the Miami Transit Company, a common carrier in the City of Miami. The buses which the Miami Transit Company operates on the streets and avenues in Highway Improvement District H-477 are very large and capable of carrying as many as from forty to seventy passengers. These buses operate on fixed schedules which require the movement of buses over the streets in said Highway Improvement District many times a day. In recognition of the fact that the continued use by the Miami Transit Company of said streets and the operation of its buses over them was destructive of the surface of said streets, the Defendant, in granting to Miami Transit Company a ten-year franchise for transportation of passengers in buses

over the streets of the City of Miami, required the Company to pay to the City for the use of the Streets the sum of $85,000.00 per Annum, together with further sums, equal to five per cent of the Company's gross revenues. From this franchise, the City has realized approximately $200,000.00 per annum. The original ten-year franchise was extended until October 8, 1955.

10.

Following the adoption of Resolution 22277, the City proceeded to resurface the streets in Highway Improvement District H-477 with fifty-pound asphalt leveler and one-inch [fol. 6] asphaltic wearing surface and thereafter on March 18, 1953, attempted to lay upon the several properties of the Plaintiffs and those for whom this wuit (sic) is brought, special assessment liens which sought to impose upon the abutting property owners the cost of the doing of said work in the sum of $173,184.00. The cost of paving the intersections, which amounted to $38,016.00, was assumed by the City.

11.

The Defendant paid all of the cost of said work out of general funds of the City which had been accumulated in a fund called Capital Surplus Account. The funds in the account were accumulated out of unexpended surpluses over budget estimates and appropriations in various funds of the City for a period of several years, and the subsequent assessments herein complained of were levied to reimburse such Capital Surplus Account for the sums so withdrawn and used in payment of the work of resurfacing the streets in Highway Improvement District H-477.

12.

The special assessment liens sought to be imposed upon the abutting property owners in Highway Improvement District H-477 are illegal and void and constitute taking of property in violation of the Constitution of the United States and of the State of Florida, upon the following grounds:

A. Resolution No. 22277 is insufficient in fact and law and gives no indication in any manner that the Defendant City intended to impose special assessment liens against the abutting properties in said District.

B. The Notice described in Paragraph 6 hereof requiring the filing of objections on March 15, 1950, was insufficient in fact and in law. No interested person was notified that objections should be filed to the confirmation of the Resolution, and the object of the Resolution was not set forth in said notice.

[fol. 7] C. The Notice was published in an inconspicuous place upon the Classified advertising section of the Miami Herald, a position in which it was least likely to attract the attention of persons such as the Plaintiffs and those on whose behalf this suit is brought.

D. Resolution No. 22277 and the subsequent Resolutions which the Defendant City adopted during and subsequent to the progress of the work do not comply with Chapter 56 of the Charter of the City of Miami in that the properties against which the assessments were made were not designated as required by said Chapter.

E. The improvements which the City made were of a general and public character, and not for the benefit of the abutting property owners.

F. Inasmuch as the City of Miami was collecting from Miami Transit Company approximately $200,000.00 per annum for the repair of streets used by the buses of said Company, and by reason of the acts of the Defendant so set forth in Paragraph 11 hereof, the subsequent attempt on the part of the City to assess the cost of such repair against such abutting property violated the rule laid down in the case of *City of St. Cloud* v. *Carlton,* 78 Fla. 131, 82 So. 616.

G. The apportionment of the cost of the work of resurfacing the streets in Highway Improvement District H-477 between the property owners and the Defendant City was entirely disproportionate to the benefits conferred, if any.

Wherefore, Plaintiffs pray that the Court decree that the assessments made against the Plaintiffs, and all other similarly situated, for the improvement of the avenues described in Highway Improvement District H-477, be declared void and the Defendant permanently enjoined from attempting to collect the same, and that the Defendant [fol. 8] be required to repay to those Plaintiffs and all persons similarly situated who have paid all or part of the said assessment, the sum of money paid to the said Defendant upon said assessment, together with interest thereon at the legal rate, and for such other and further relief as to the Court seems proper.

/s/ Anderson & Nadeau, Attorneys for Plaintiffs.

Anderson & Nadeau, First National Bank Building, Miami 32, Florida.

[fol. 8a]

EXHIBIT 2 TO AMENDED COMPLAINT

CLASSIFIED

INFORMATION

RATES PER LINE PER INSERTION EFFECTIVE SEPTEMBER 9th 1949

Times	1	2	3	4	5	6	7	30
Per Day	30c	30c	30c	30c	30c	30c	30c	31c

14 pt same rate as 3 lines ordinary type.

18 pt same rate as 4 lines ordinary type.

24 pt same rate as 5 lines ordinary type.

36 pt same rate as 7 lines ordinary type.

National Advertising Rates

These rates apply to advertisements emanating from outside the state of Florida. No reduction for consecutive insertions. Minimum charge 34c. Ordinary type 42c per line per day. Light Face Caps 63c per line per day.

In the event of any error in an advertisement on the part of the publisher it will furnish the advertiser a letter so worded as to explain the said error and the publisher shall be otherwise relieved from responsibility thereof.

The Herald will not be responsible for more than one incorrect insertion.

The Miami Herald reserves the privilege of revising or rejecting any advertisement which it deems objectionable and to change the classification of any advertisement from that ordered to conform to the policy of this paper.

TELEPHONE 9-3711

USE THE HERALD FOR RESULTS

LEGAL NOTICES

NOTICE OF LOCAL IMPROVEMENT

Highway Improvement District H-477

All interested will take notice that at a meeting of the City Commission at 9:30 o'clock A. M. March 15th, 1950, their objections will be heard to the confirmation of Resolution No. 22277, adopted March 1st, 1950, ordering paving improvements on the following avenues, to-wit:

N. E. 1st Avenue, from S. E. 2nd Street to N. E. 14th Street;

N. E. 2nd Avenue, from Flagler Street to 41st Street;

N. W. and S. W. 3rd Avenue, from S. W. 1st Street to N. W. 20th Street;

South Miami Avenue, from S. W. 1st Street to S. W. 15th Road;

North Miami Avenue, from Flagler Street to N. W. 20th Street;

N. W. 2nd Avenue, from N. W. 20th Street to N. W. 36th Street;

S. W. 17th Avenue, from Flagler Street to Tamiami Trail.

Designated Improvement H-477.

Plans, specifications and estimate of cost of said improvement are on file in the City Clerk's office.

F. L. CORRELL
City Clerk

[fol. 18]

IN THE CIRCUIT COURT FOR DADE COUNTY

Following Denial of the City's Petition for Certiorari the City Filed Its Answer in Words and Figures as Follows:

ANSWER IN CASE #159201

City of Miami, by and through its undersigned counsel, for answer to the Bill of Complaint as amended, avers:

1. Defendant is without knowledge of the allegations contained in Paragraph 1 of the Amended Bill of Complaint with the exception of those allegations referring to assessments made by the City against the property abutting on the said described streets and avenues, which defendant admits.

2. This defendant admits that plaintiffs purport to sue on their own behalf and on behalf of all other owners of real property abutting on the streets and avenues as set out in the Amended Bill of Complaint against whom assessments have been made by the City for the cost thereof, but defendant denies that plaintiffs do represent all of the various classes of such property owners.

3. Defendant admits the allegations of Paragraphs 3, 4, 5 and 6 of the Amended Complaint. Defendant states that for further answer to Paragraph 5 that publication of the referenced resolution is not required.

4. Defendant admits that part of Paragraph 7 alleging that streets had originally been paved at the expense of the abutting property owners. The remaining allegations and conclusions of the plaintiff are denied.

5. Defendant admits that part of Paragraph 8 alleging that neither the plaintiffs nor those for whom this suit is brought, filed objections as required by said notice. The remaining allegations and conclusions of the plaintiffs are denied.

[fol. 19] 6. Defendant denies the allegations of Paragraph 9 with the exception of those allegations referring to the existence and terms of the franchise granted to the Miami Transit Company. The said franchise covers the use of a majority of the streets and avenues of the City and the streets and avenues involved in this suit are a minor portion thereof.

7. Defendant admits Paragraph 10 of the Amended Complaint as will be more fully set forth hereinafter.

8. Defendant denies Paragraphs 11 and 12 of the Amended Complaint.

9. Defendant denies that plaintiffs and each of them and each of those whom plaintiffs purport to represent, are entitled to the relief sought in the prayer of the said Amended Bill of Complaint, and further says that plaintiff Hunter Lyon, Inc. and all those persons whom Hunter Lyon, Inc. purport to represent who have paid all or part of their assessments here in question, have a plain and adequate remedy at law for the recovery of the monies paid if they be entitled to such recovery. Defendant further denies any other and further allegations contained in said Amended Bill of Complaint which it has not expressly denied or admitted hereinabove.

10. Affirmatively answering the Amended Bill of Complaint, this defendant alleges that it is a municipal corporation, organized and existing under the laws of the State of Florida; that under its general Charter, which is Chapter 10847, Special Acts of Florida 1925, the defendant was given the power to pave, re-pave, macadamize, and re-macadamize

highways, the necessary drainage, sewer inlets, manhole and catch basins, and if the Commission so orders, may embrace curbs and gutters, and that pursuant to and in accordance with this power, the City Commission of the defendant by Resolution 22277 ordered a local improvement [fol. 19a] designated as Highway Improvement H-477. The ordering resolution followed the requirements of Section 56(c) of the City Charter by ordering the local improvements to be made by indicating the location by terminal points and route; giving a description of the improvement by its material, nature, character and size; giving the short and convenient designation (Highway Improvement H-477) to the improvement; and designating as District H-477 the property against which the assessments are to be made for the cost of such improvement and thereafter the City Manager filed with the City Clerk of the defendant corporation his preliminary estimate as to the cost of said improvements together with plans and specifications, and upon the filing with the City Clerk of such plans, specifications and estimates the City Clerk caused to be published on March 4, 1950 the notice of hearing following literally the requirements of Section 56(e) of the City Charter, said notice stating that at a meeting of the City Commission on a certain day, March 15, 1950 and hour, 9:30 A.M., the City Commission would hear the objections of all interested persons to the confirmation of Resolution No. 22277 adopted March 1, 1950, and in brief and general terms a description of the proposed improvement with the location thereof, and that plans, specifications and estimates of the cost thereof are on file in the Office of the City Clerk. At the time named in said notice of the City Commission called a hearing for the purpose of receiving objections of all persons interested in the confirmation of said Resolution No. 22277, ordering the said improvements, all in conformity with the provisions of the Charter hereinabove described, no objections were sustained and the City Commission by Resolution No. 22301 confirmed Resolution No. 22277 (ordering Highway Improvement District H-477). Defendant alleges that by virtue of the proceedings herein- [fol. 19b] above set forth and the resolution ordering said improvements, defendant acquired jurisdiction to make the

said improvements. Defendant further alleges that plaintiffs and all those persons whom plaintiffs purport to represent, were under the duty therefor to appear and object if they so desired to the confirmation of Resolution 22277 ordering said improvements, that notwithstanding the fact that they were under such duty to object to the commencement of the proceedings ordering said improvements, plaintiffs and each of them and each of the persons whom plaintiffs purport to represent in this cause, wholly failed to appear and wholly failed to make any objection whatever to the confirmation of the resolution ordering said improvements. Defendant further alleges that plaintiffs and each of them and each of those persons whom plaintiffs purport to represent herein, were under the duty by reason of being properly and legally notified to appear and object, to file their written objections with the City Clerk of the defendant to the confirmation of the assessment roll as required by Section 56(l)(m) of the said City Charter and Special Acts. Plaintiffs and each of them and each of those persons whom they purport to represent failed to appear and failed to file their written objections to the confirmation of the assessment roll. Defendant further alleges that plaintiffs and each of them and each of those persons whom they purport to represent failed to file within ten days from the confirmation of the assessment roll fixing assessments complained of in the Amended Bill of Complaint, their written verified petition in the Office of the Clerk of the Circuit Court in and for Dade County, Florida, in conformity with Section 56(n) of the said City Charter, objecting to the assessments or any phase thereof, or questioning the benefits accruing to the property of each of such property owners, and further alleges that the time for taking an [fol. 19c] appeal from the decision of the Circuit Court, which was provided for in that section of the Charter and Act hereinabove cited, has expired.

11. Defendant further alleges that plaintiffs and each of them and each of those whom plaintiffs purport to represent, who failed to appear and object at the meeting hereinabove set forth and who failed to take advantage of the appeal to the Circuit Court provided for, as hereinabove

set forth, waived their rights to object to the assessments here in question, waived their rights to question the benefits accruing to their property, and are now estopped by their failure to act as required by law, to question herein the validity of the assessments, and are estopped to question the benefits accruing to their property.

12. Further affirmatively answering, this defendant alleges that the conduct of the plaintiffs and each of them and each of those whom plaintiffs purport to represent, in permitting the improvements to be accomplished without inquiry or objection on their part to ascertain the method of financing, including the advertising for contractors' bids, the letting of contracts, the performance of the work involved, the payment of the contracts, and the assessment of the costs, estopps the plaintiffs to now question the validity of the assessment lien.

13. Further affirmatively answering, this defendant alleges that each of the actions of the defendant were taken pursuant to substantial compliance with the Charter of the City of Miami, and that all of the acts questioned in the complaint are lawful and not in controvention (sic) of the rights of the plaintiffs and those plaintiffs purport to represent.

14. Further affirmatively answering, this defendant alleges that the streets and avenues involved herein were [fol. 19d] in need of paving, re-paving, macadamizing, and re-macadamizing prior to the actions of the Commission of the City of Miami.

15. Further answering, this defendant alleges that the plaintiffs and each of them and each of the persons whom plaintiffs purport to represent, had actual knowledge, or were charged with knowledge that the defendant was making the improvements here in question and for which the assessments complained of were made, before, during, and after the time said improvements were made, and that although the statutes and laws under which said improvements were made and the general laws of the State of Florida provided plaintiffs with various means for objecting to the assessments or showing that no benefits would accrue to their property, and provided plaintiffs with a

means of preventing the said work from being done if the assessments were invalid or of no benefit to plaintiffs' property, the plaintiffs and each of them and each of the persons whom plaintiffs purport to represent stood by, acquiesed (sic) in, and did not object to the work being done, and failed to use the remedy so provided by law, and thereby plaintiffs waived any right which they had to object and plaintiffs and each of them and each of the persons whom plaintiffs purport to represent, are now estopped from asserting the invalidity of the assessments here in question and are estopped from denying the benefit of value of the improvements so made by the defendant. Defendant further alleges that the action of the City Commission in determining that the streets were in need of the work performed and that each of the plaintiffs were especially benefited by the local improvement involved here, is conclusive upon the plaintiffs and that the action of the City Commission in confirming the preliminary assessment roll is conclusive upon the plaintiffs.

16. Further answering, this defendant alleges that the cost of the improvements was advanced by the City from [fol. 19e] the general fund surplus account to be reimbursed by levy of the special assessment, as evidenced by the adoption of the special assessment resolution.

17. Further answering, this defendant alleges that Section 5C(p) of said City Charter provides that if the owner of any lot or parcel assessed in excess of $25.00 shall file with the Director of Finance such date on which full payment is required his written undertaking, waiving all irregularity and illegality in connection with the said assessment against said lot or parcel, he shall have the privilege of paying the same in equal annual installments in each of the ten succeeding years or such shorter period as may be fixed by the Commission, and that, therefore, the plaintiffs and each of them and each of the persons whom plaintiffs purport to represent, having paid a portion of the special assessments, have expressly waived any purported irregularities or illegalities in connection with the said assessment.

Wherefore, defendant alleges that plaintiffs and each of them and each of the persons whom plaintiffs purport to represent, are not entitled to the relief sought and hereby renews its defensive motions as if fully set out herein en haec verba, and prays that this Court dismiss the Amended Bill of Complaint, with costs assessed against the plaintiffs.

J. W. Watson, Jr., City Attorney, Robert M. Haverfield, Assistant City Attorney, Solicitors for Defendant, By /s/ Robert M. Haverfield, Of Counsel.

(Certification of mailing omitted)

[fol. 19f]

DEFENDANT'S EXHIBIT #1 FILED IN EVIDENCE 7/20/54 M.C.W.

RESOLUTION NUMBER 22277

HIGHWAY IMPROVEMENT H-477 DISTRICT
A RESOLUTION ORDERING LOCAL IMPROVEMENT H-477

BE IT RESOLVED by the City Commission of the City of Miami:

That a local improvement, described and designated as follows, shall be made under Section 56 of the City Charter: Highway Improvement H-477 as follows:

ON:

N.E. 1st Avenue from S.E. 2nd Street to N.E. 14 Street

N.E. 2nd Avenue from Flagler Street to 41st Street

N.W. and S.W. 3rd Avenue from S.W. 1st Street to N.W. 20th Street

South Miami Avenue from S.W. 1st Street to S.W. 15th Road

North Miami Avenue from Flagler Street to N.W. 20th Street

N.W. 2nd Avenue from N.W. 20th Street to N.W. 36th Street

S.W. 17th Avenue from Flagler Street to Tamiami Trail

For resurfacing of existing asphaltic concrete pavement with a fifty pound (50#) asphalt concrete leveler course and one inch (1") asphaltic concrete wearing surface, including necessary intersection returns and intersections.

The property against which special assessments for the cost thereof shall be made is hereby designated District H-477.

PASSED AND ADOPTED this 1st day of Mar. 1950.

DEFENDANT'S EXHIBIT "B" FILED IN EVIDENCE 7/22/54 M.C.W.

CITY MANAGER'S ESTIMATE OF COST

of

LOCAL IMPROVEMENT AND INCIDENTAL EXPENSES FOR STREET RESURFACING

HIGHWAY IMPROVEMENT H-477, DISTRICT

[fol. 19g] ORDERED BY RESOLUTION NO. 22277 ADOPTED Mar. 1, 1950.

ESTIMATED COST OF IMPROVEMENT		$192,000.00
ESTIMATED INCIDENTAL EXPENSES:		
1. Surveys and Estimates	$4,000.00	
2. Inspection, tests and supervision of construction	$8,000.00	
3. Preparation of plans and specifications	$4,000.00	
4. Printing and publishing notices and proceedings	$ 100.00	
5. Preparation of bonds	$	
6. Interest during construction	$	
7. Legal services, abstracts, etc	$	
8. Other necessary and proper expenses	$3,100.00	
Total incidental expenses		$ 19,200.00
TOTAL ESTIMATED COST AND INCIDENTAL EXPENSES		$211,200.00

DISTRIBUTION:

1.	Estimated cost to be paid by City of Miami	$ 38,016.00
2.	Estimated cost to be assessed abutting property	$173,184.00
3.	Estimated cost of —— lin. ft. lateral	$
4.	Number of feet of property abutting improvement	$ 84,945.00
5.	Estimated assessment per front foot	$ 2.04
6.	Estimated assessment per lin. ft. of lateral	$

WITNESS my signature at Miami, Florida, this 3rd day of Mar., A.D. 1950.

(s) O. P. Hart
City Manager.

DEFENDANT'S EXHIBIT C FILED IN EVIDENCE 7/22/54

[fol. 19h] THE MIAMI HERALD

Published Daily

Miami — Dade — Florida

STATE OF FLORIDA
COUNTY OF DADE:

Before the undersigned authority personally appeared M.F. Self, who on oath says that he is Classified Advertising Manager of The Miami Herald, a daily newspaper published at Miami in Dade County, Florida; that the attached copy of advertisement, being a ..... in the matter of ..... in the ..... Court, was published in said newspaper in the issues of

3/4, 1950

Affiant further says that the said The Miami Herald is a newspaper published at Miami, in the said Dade County, Florida, and that the said newspaper has heretofore been continuously published in said Dade County, Florida, each day and has been entered as second class

mail matter at the post office in Miami, in said Dade County, Florida, for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that he has neither paid nor promised any person, firm or corporation any discount, rebate, commission or fund for the purpose of securing this advertisement for publication in the said newspaper.

/s/ M. F. Self

Sworn to and subscribed before me this 6th day of March, A.D. 1950

Louise Muhleman
Notary Public, State of Florida
at large My commission expires
Nov. 4, 1953.
Bonded by American Surety Co. of
N.Y.

NOTICE OF LOCAL IMPROVEMENT Highway Improvement District H-477

All interested will take notice that at a meeting of the City Commission at 9:30 o'clock A.M. March 15th, 1950 their objections will be heard to the confirmation of Resolution No. 22277, adopted March 1st, 1950 ordering paving improvements on the following avenues, to-wit:

N.E. 1st Avenue from S.E. 2nd Street to N.E. 14th Street; N.E. 2nd Avenue from Flagler Street to 41st Street; N.W. and S.W. 3rd Avenue from S.W. 1st Street to N.W. 20th Street; South Miami Avenue from S.W. 1st Street to S.W. 15th Road; North Miami Avenue from Flagler Street to N.W. 20th Street; N.W. 2nd Avenue from N.W. 20th Street to N.W. 36th Street S.W. 17th Avenue, from Flagler Street to Tamiami Trail.

Designated Improvement H-477. Plans, specifications and estimate of cost of said improvement are on file in the City Clerk's office.

F.L. Correll
City Clerk

3-4-50

DEFENDANT'S EXHIBIT #1 FILED IN EVIDENCE 7/20/54
MARSHALL C. WISEHEART

[fol. 19i]

RESOLUTION NO. 22301

A RESOLUTION CONFIRMING RESOLUTION NO. 22277 ORDERING PAVING IMPROVEMENT IN HIGHWAY IMPROVEMENT DISTRICT H-477.

WHEREAS, at a meeting held at 9:30 o'clock A.M., March 15, 1950, after legal notice, the City Commission heard all objections presented by interested persons to the confirmation of Resolution No. 22277, ordering Highway Improvement District H-477, which included construction on the following streets:

NE 1st Avenue from SE 2nd Street to NE 14th Street;
NE 2nd Avenue from Flagler Street to 41st Street;
NW and SW 3rd Avenue from SW 1st Street to NW 20th Street;
South Miami Avenue from SW 1st Street to SW 15th Road;
North Miami Avenue from Flagler Street to NW 20th Street;
NW 2nd Avenue from NW 20th Street to NW 36th Street;
SW 17th Avenue from Flagler Street to Tamiami Trail,

and the plans and specifications and estimate of cost thereof, and no objections were sustained;

NOW, THEREFORE, BE IT RESOLVED BY THE COMMISSION OF THE CITY MIAMI, FLORIDA:

What Resolution No. 22277, adopted March 1st, 1950, ordering Highway Improvement District H-477, be, and the same is hereby confirmed.

PASSED AND ADOPTED this 15th day of Mar., A.D. 1950.

MIAMI DAILY NEWS

Published Daily
Miami, Dade County, Florida

Before the undersigned authority personally appeared Jacob Booth who on oath says that he is Controller of the Miami Daily News, a daily newspaper published at Miami in Dade County, Florida; that the attached copy of advertisement, being legal notice in the matter of Preliminary Assessment Roll—District H-477 in the ..... Court, was published in said newspaper in the issues of February 20 & 27, 1953

[fol. 19j] Affiant further say that the said Miami Daily News is a newspaper published at Miami, in said Dade County, Florida, and that the said newspaper has heretofore been continuously published in said Dade County, Florida, each day and has been entered as second class mail matter at the postoffice in Miami, in said Dade County, Florida, for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that he has neither paid nor promised any person, firm or corporation any discount, rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper.

J. Booth

Sworn to and subscribed before
me this 27th day of February, A.D. 1953

(SEAL)

Roland Wilfred Vandrin
Notary Public

Notary Public, State of Florida at large
My commission expires May 15, 1955
Bonded by American Surety Co. of N.Y.

NOTICE TO PROPERTY OWNERS Preliminary Assessment Roll District H-477

All interested will take notice that at a meeting of the City Commission at 9:30 o'clock A.M. March 4th 1953, their objections will be heard to the confirmation of the Preliminary Assessment Roll for the cost of paving improvements on the following Avenues, to-wit:

SE & NE 1st Ave., from SE 2nd St. to NE 14th St.;

N. Miami Ave., from Flagler St., to North 20th St. in District H-477

Said Preliminary Assessment Roll is now opén to public inspection in the City Clerk's Office.

F.L. Correll
City Clerk

Similar notices were published regarding the assessments on property abutting other streets in the District.

[fol. 20]

IN THE CIRCUIT COURT FOR DADE COUNTY

FINAL DECREE IN CHANCERY CAUSE NO. 159201—February 16, 1955

The above cause came on to be heard before me upon the complaint, answer, and the testimony taken before the Court, and the Court being fully informed of its judgment to be given in the premises, finds as follows:

1. That on March 1, 1950, the defendant City adopted Resolution 22277 in which it created Highway Improvement District No. h-477, comprising the following streets and thoroughfares in Miami, Florida, namely:

NE 1st Avenue from SE 2nd Street to NE 14th Street;

NE 2nd Avenue from Flagler Street to 41st Street;

NW and SW 3rd Avenue from SW 1st Street to NW 20th Street;

South Miami Avenue from SW 1st Street to SW 15th Road;

North Miami Avenue from Flagler Street to NW 20th Street;

NW 2nd Avenue from NW 20th Street to NW 36th Street;

SW 17th Avenue from Flagler Street to Tamiami Trail.

2. Thereafter, the City caused to be published in the classified advertising section of the Miami Herald a notice requiring all persons to take notice that at a meeting of the City Commission at 9:30 o'clock A.M. on March 15th objections would be heard to the confirmation of such resolution.

3. That thereafter the defendant City resurfaced the existing streets comprising said Improvement District by applying a 50-pound leveler course, and a 1-inch asphaltic concrete wearing surface to the existing pavement. The base and the existing surface were in no wise disturbed except in a very limited area where old street railway ties were removed. The existing curbings and gutters were in no wise altered.

4. The City imposed the cost thereof upon the abutting property owners, with the exception of the intersections, the cost of which was assumed by the City.

[fol. 21] 5. The notice of the hearing of objections to the imposition of the assessment hereinabove referred to was insufficient as a matter of law in that it specified no place where the objections would be heard, and there was no designation in the notice of what city commission was to hear objections, no designation of the City in which the streets were located, or of what city the person filing the notice was clerk. The notice was also insufficient because it was inserted in the classified section of the Miami Herald and in such a manner that it cannot be said that any reasonable person was put upon notice by it that their property was going to be subjected to a special assessment.

6. The streets which comprise Highway Improvement District No. H-477 are thoroughfares and arterial highways, with but one exception, in the city of Miami, and the resurfacing was necessary to keep the streets in repair to facilitate the flow of traffic on such streets in and out of the downtown Miami area.

7. No special benefit was conferred upon the abutting property by the resurfacing of said streets, and the benefit which was derived therefrom was general and not special.

8. The City of Miami resurfaced in a similar manner Flagler Street in an area which traverses the streets involved in Highway Improvement District No. H-477, and paid the cost of that resurfacing from the general funds. This fact was admitted by counsel for the City at the time of final argument.

9. The cost of said resurfacing was paid for by the City out of a surplus in the general fund which had accumulated over the course of years from many sources.

[fol. 22] It is therefore Ordered, Adjudged and Decreed as follows:

1. That as a result of the findings hereinabove contained, the City was without lawful authority to impose on the abutting property owners the cost of the resurfacing of the streets comprising Highway Improvement District H-477, and the action of the City in assessing the cost of the paving of the streets against the abutting owners was unreasonable and null and void.

2. This cause is hereby referred to J P Marchant as Special Master, and he is hereby directed to ascertain and determine which of the abutting owners in Highway Improvement District H-477 have paid the assessment liens and which have not; that said Special Master shall report to the Court within 60 days from the date of this order his recommendations as to the persons to whom refunds should be made for the amounts which the City has received on account of said special assessment liens and the date on which, if any, interest on repayments should be charged against the City, together with a statement of the persons whose liens have not been paid and the method by which cancellation of such liens should be effected.

3. The said Special Master shall also recommend to this Court what attorneys fees should be allowed to the attorneys for the plaintiffs, and the method by which the payment of such fees shall be accomplished, both with respect to the parties who have paid their liens and those who have not.

4. This decree is final as to the determination of the invalidity of the special assessment liens as hereinabove set forth. Jurisdiction is retained for the purpose of enter-
[fol. 23] ing such further orders as may be necessary to carry out the further provisions of the decree.

Done and Ordered in Chambers at Miami, Florida, this 16 day of February, 1955.

/s/ Marshall C. Wiseheart, Circuit Judge.

IN THE CIRCUIT COURT FOR DADE COUNTY

ORDER AMENDING FINAL DECREE IN CASE NO. 159201
—March 22, 1955

This Cause coming on to be heard upon motion ore tenus by the City of Miami to strike paragraph "8" of the Final Decree as heretofore entered by this Court on the basis that such findings are inaccurate in that the cost of resurfacing Flagler Street was not made from general funds of the City, and counsel for the respective parties herein being present, and the Court being fully advised in the premises, it is

Ordered, Adjudged and Decreed that the Final Decree as heretofore entered in this cause on February 17, 1955, be and the same is hereby amended to the extent that paragraph "8" thereof be and the same is hereby stricken from the said Final Decree.

Done and Ordered at Miami, Florida, this 22nd day of March, 1955.

Marshall C. Wiseheart, Circuit Judge.

[fol. 24]

IN THE CIRCUIT COURT FOR DADE COUNTY

NOTICE OF APPEAL IN CASE NO. 159201

The defendant The City of Miami, a Municipal Corporation existing under the laws of the State of Florida, by and through its undersigned attorneys, takes and enters

its appeal to the Supreme Court of Florida to review the final decree, as amended, of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, bearing date the 17th day of February, 1955, entered in the above styled cause and recorded in the records of said Court in Book 1171, page 385, and all parties to said cause are called upon to take notice of the entry of this appeal.

J. W. Watson, Jr., City Attorney, Robert M. Haverfield, Assistant City Attorney, Attorneys for Defendant City of Miami, a Municipal Corporation. By /s/ Robert M. Haverfield, Of Counsel.

(Certification of delivery omitted).

IN THE CIRCUIT COURT FOR DADE COUNTY

CITY OF MIAMI'S ASSIGNMENTS OF ERROR IN CASE NO. 159201

Comes Now The City of Miami, a Municipal Corporation existing under the laws of Florida, within less than ten (10) days from the filing of the Notice of Appeal herein, and assigns the following as error upon which it intends to rely in the Supreme Court of Florida, for the reversal of the Final Decree entered February 17, 1955 herein, as amended, as follows, to wit:

[fol. 25]

* * * * * * *

3. The Chancellor erred in finding that the Notice of Hearing of Objections to the Confirmation of the Resolution ordering Highway Improvement District H-477 was insufficient as a matter of law.

4. The Chancellor erred in finding that the Notice was insufficient because it was inserted in the classified section of the "Miami Herald."

5. The Chancellor erred in finding that any reasonable person was not put upon notice that their property was to be specially assessed.

* * * * * * *

[fol. 26]

* * * * * * *

J. W. Watson, Jr., City Attorney, Robert M. Haverfield and John H. Smith, Assistant City Attorneys, Attorneys for Defendant City of Miami, a Municipal Corporation, By Robert M. Haverfield, Of Counsel.

CLERK'S NOTE RE GANGER CASE NO. 167798-G

On April 1, 1954, Norton R. Ganger and L. C. Bethart filed their complaint which was substantially identical with the complaint filed in the Hamilton case. The Granger (sic) case is numbered 167798-G. City filed an answer substantially identical with the answer filed in the Hamilton case.

IN THE CIRCUIT COURT FOR DADE COUNTY

NORTON R. GANGER and L. C. BETHART, et al., Plaintiffs,

v.

THE CITY OF MIAMI, a municipal corporation in Dade County, existing under the laws of the State of Florida, Defendant.

FINAL DECREE CHANCERY CAUSE NO. 167798-G—
February 17, 1954

The above cause came on to be heard before me upon the complaint, answer, and the testimony taken before the Court, and the Court being fully informed of its judgment to be given in the premises, finds as follows:

1. On November 19, 1952, the defendant City enacted Resolution No. 25006, in which it created Highway Improvement District No. H-503, comprised of the following street or thoroughfare in the City of Miami, Florida, namely:

South Miami Avenue from SW 15th Road to 200 feet more or less south of Alatka Street.

[fol. 27] 2. Thereafter, the City caused to be published in the classified section of the Miami Herald a notice requiring all interested persons to take notice that a meeting of the City Commission at 9:30 o'clock A.M. on December 3, 1952 would be held, at which objections would be heard to the confirmation of such resolution.

3. Thereafter, the defendant City resurfaced the street comprising said Improvement District No. H-503 by applying a ½-inch leveler course and a 1-inch surface course to the existing pavement. The base and the existing surface were in no wise disturbed. The existing curbings and gutters were in no wise altered.

4. The City imposed the cost of the resurfacing upon the abutting owners, with the exception of the intersections, which was paid for by the City.

5. The notice of the hearing of objections to the imposition of the assessment hereinabove referred to was insufficient as a matter of law in that it specified no place where the objections would be heard, and there was no designation in the notice of what City commission was to hear objections, no designation of the city in which the street was located, or of what city the person filing the notice was clerk. The notice was also insufficient because it was inserted in the classified section of the Miami Herald and in such a manner that it cannot be said that any reasonable person was put upon notice by it that their property was going to be subjected to a special assessment.

6. The resurfacing was necessary to keep the street in repair and facilitate the flow of traffic. The work was for the benefit of the general public, and the abutting owners received no special benefit.

[fol. 28] 7. The cost of the resurfacing was paid for with funds from a surplus in the general fund accumulated over the course of years.

It is therefore Ordered, Adjudged and Decreed as follows:

1. That as a result of the findings hereinabove contained, the City was without lawful authority to impose on the abutting property owners the cost of the resurfacing of the streets comprising Highway Improvement District No. 503, and the action of the City in assessing the cost of the paving of the street against the abutting owners was unreasonable and null and void.

2. This cause is hereby referred to J. P. Marchant, as Special Master, and he is hereby directed to ascertain and determine which of the abutting owners in Highway Improvement District H-503 have paid the assessment liens and which have not; that said Special Master shall report to the Court within 60 days from the date of this order his recommendations as to the persons to whom refunds should be made for the amounts which the City has received on account of said special assessment liens and the date on which, if any, interest on repayments should be charged against the City, together with a statement of the persons whose liens have not been paid and the method by which cancellation of such liens should be effected.

3. The said Special Master shall also recommend to this Court what attorneys fees should be allowed to the attorneys for the plaintiffs, and the method by which the payment of such fees shall be accomplished, both with respect to the parties who have paid their liens and those who have not.

[fol. 29] 4. This decree is final as to the determination of the invalidity of the special assessment liens as hereinabove set forth. Jurisdiction is retained for the purpose of entering such further orders as may be necessary to carry out the further provisions of the decree.

Done and Ordered in Chambers at Miami, Florida, this 17 day of February, 1954.

/s/ Marshall C. Wiseheart, Circuit Judge.

IN THE CIRCUIT COURT FOR DADE COUNTY

NOTICE OF APPEAL IN CASE NO. 167798-G

The defendant The City of Miami, a Municipal Corporation, existing under the laws of the State of Florida, by and through its undersigned attorneys, takes and enters its appeal to the Supreme Court of Florida to review the final decree of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, bearing date the 17th day of February, 1955, entered in the above styled cause and recorded in the records of said Court in Book 1171, page 362, and all parties to said cause are called upon to take notice of the entry of this appeal.

J. W. Watson, Jr., City Attorney, Robert M. Haverfield, Assistant City Attorney, Attorneys for Defendant City of Miami, a Municipal Corporation. By Robert M. Haverfield, Of Counsel.

(Certification of delivery omitted)

[fol. 30]

IN THE CIRCUIT COURT FOR DADE COUNTY

CITY OF MIAMI'S ASSIGNMENTS OF ERROR IN CASE NO. 167798-G

Comes Now The City of Miami, a Municipal Corporation existing under the laws of Florida, within less than ten (10) days from the filing of the Notice of Appeal herein, and assigns the following as error upon which it intends to rely in the Supreme Court of Florida, for the reversal of the Final Decree entered February 17, 1955 herein, as follows, to wit:

* * * * * * *

3. The Chancellor erred in finding that the Notice of Hearing of Objections to the Confirmation of the Resolution ordering Highway Improvement District H-503 was insufficient as a matter of law.

4. The Chancellor erred in finding that the Notice was insufficient because it was inserted in the classified section of the "Miami Herald".

5. The Chancellor erred in finding that any reasonable person was not put upon notice that their property was to be specially assessed.

* * * * * * *

[fol. 31]

J. W. Watson, Jr., City Attorney, Robert M. Haverfield and John H. Smith, Assistant City Attorneys, Attorneys for Defendant City of Miami, a Municipal Corporation, By Robert M. Haverfield, Of Counsel.

IN THE CIRCUIT COURT FOR DADE COUNTY

ORDER OF CONSOLIDATION—April 22, 1955

This Cause having come on for final hearing and the Court having consolidated the above cause with that certain Chancery case of Norton R. Ganger and L. C. Bethart, et al., Plaintiffs, against The City of Miami, a Municipal Corporation, etc., Defendant, No. 167798-G, in and for Dade County, [fol. 32] and the said causes having been heard as consolidated, thereby resulting in one Record for both causes, and Notices of Appeal having been filed in both causes by the defendant The City of Miami, and the Court being fully advised in the premises, it is

Ordered, Adjudged And Decreed that the original Record shall constitute the Record on Appeal in both causes in accordance with Rules 33(1) and 34(7) of the Florida Supreme Court Rules adopted July 19, 1954, effective March 15, 1955.

Done And Ordered in Chambers at Miami, Florida, this 22nd day of April, 1955.

Marshall C. Wiseheart, Circuit Judge.

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1957 En Banc

Case No. 28,057

THE CITY OF MIAMI, a Municipal corporation in Dade County, existing under the laws of the State of Florida, Appellant,

vs.

NORTON R. GANGER and L. C. BETHART, et al., Appellees.

OPINION Filed January 30, 1957

THOMAS, J.:

The appellant by resolution created a Highway Improvement District, published a notice that at a designated time "objections would be heard to the confirmation of such [fol. 33] resolution," to quote from the decree, and subsequently improved a certain street described in the resolution and the notice by applying a one-half inch "leveler" course and a one inch surface course. The base of the street and the curbs and gutters were not disturbed. In other words, the city resurfaced the existing street and undertook by the resolution to charge the cost, except for improving the intersections, to the abutting owners.

The judge decided that the notice was insufficient and that the appellant lacked the authority to impose the cost of an improvement of this nature upon the property owners. He appointed a master to ascertain what amounts had been paid by the various owners on the liens that had been filed to secure payment of the assessments, evidently with the view of later ordering the owners reimbursed.

We will detail the reasons for the rulings as we discuss the questions presented in the briefs.

The appellant claims that authority for the procedure was granted by Sec. 56 of the city charter, Chapter 10847, Laws of Florida, Special Acts of 1925, as amended. In that act we find that the city has the power to grade, pave, re-

pave, macadamize and remacadamize streets and specially assess the cost against adjacent property. Improvements and the eventual assessments are initiated by resolution of the city commission defining the termini and routes and the character of the work proposed.

After adoption of the resolution, plans and specifications for the work showing the estimated cost are prepared by the manager and filed with the city clerk. When these are filed, the clerk is required to publish "once in a daily newspaper of general circulation" a notice that at a meeting of the commission "on a certain day and hour" objections of interested persons to the confirmation of the resolution will be heard. The notice must contain, though it may be in brief or general terms, the description and location of the [fol. 34] improvement and a statement that plans, specifications and estimates have been filed.

So to generate the power vested by the statute, the resolution must be adopted, and to secure due process to those who must pay the cost, or whose property will be responsible for it, the notice defined in the law must be given.

The notice involved in the instant litigation follows: "All interested will take notice that at a meeting of the City Commission at 9:30 o'clock A. M. December 3rd, 1952, their objections will be heard to the confirmation of Resolution No. 25006, adopted November 19th, 1952 ordering paving improvements on South Miami Avenue, from S. W. 15th Street Road to 200' more or less south of Alatka Street, designated improvement H-503.

"Plans, specifications and estimate of cost of said improvements are on file in the City Clerk's office.

F. L. CORRELL
November 22, 1952. City Clerk."

When we place side by side the relevant section of the charter and the notice we have fully quoted, it is plain to us that the latter contained all elements required by the statute. It was published once in a newspaper of general circulation, The Miami Herald; it carried the date and hour of the meeting of the city commission at which complaints would be entertained; it contained a brief general descrip-

tion of the location where the improvement would be made; and it included the statement that the plans, specifications and estimates had been filed with the clerk.

The appellees seem to have convinced the circuit court that there were five defects rendering the notice insufficient: (1) failure to mention the place, that is, the city, where the objections would be heard, (2) absence of the name of the city commission which would hear them, (3) omission of the [fn. 3] name of the city where the streets lay; (4) want of identity of the signatory; (5) insertion of the notice in the classified section of the Herald.

The law only requires that persons interested be notified that protests will be heard at a meeting of the commission, and that the day and hour the commission will meet for the purpose be shown. No mention is made about naming in the notice the place where the commission would hold the particular meeting.

It seems to us that an interpretation that a property owner who wished to object to the proceeding would not be sufficiently informed to be able to locate a meeting of the commission of the city of Miami would be far-fetched. We have the same view about the complaint that the commission that would hear the complaints was not named. In the description of the street appears the familiar title "South Miami Avenue," and the notice appeared in The Miami Herald. We apprehend that few citizens of this state and no owners of property in Miami at all, especially on Miami Avenue between S. W. 15th Street and the vicinity of Alatka Street, would be unaware that these titles pertain to that city. We conclude that anyone purchasing an edition of the Herald and reading the notice would be fully conscious of the nature, place and purpose of the meeting.

Our reaction to the next two so-called imperfections, lack of identity of the city and the signer of the notice, is the same for the same reasons.

As for the position in the paper, among the classified advertisements, we simply say that the publication is the test and that there is no requirement that the notice shall appeal (sic) in any special section of the newspaper. Actually the notice did not appear under the caption "CLASSIFIED INFORMATION" but immediately above it was the title

"LEGAL NOTICES." We think this position was quite appropriate.

[fol. 36] "The purpose of notice under proceedings of this kind is to secure to the owner the opportunity to protect his property from the lien of the proposed tax * * * and, in order to be effectual, it should be so full and clear as to disclose to persons of ordinary intelligence *in a general way* what is proposed and when and where property owners may be heard." (Italics supplied.) Escott v. City of Miami, 107 Fla. 273, 144 So. 397.

We consider that the notice substantially conformed to the statute and that any protestant was advised when he could appear and where he could get full information about the contemplated work inasmuch as the plans, specifications and estimates were shown to be on file in the clerk's office and to relate to a certain numbered resolution dealing with improvement of a stated street.

On the matter of the validity of the notice we must disagree with the chancellor, and by disagreeing, we cannot adopt the view that the property owners could ignore the notice and at this late date successfully attack the action of the city, on the ground that due process had not been afforded them.

The chancellor thought that "resurfacing was necessary to keep the street in repair and facilitate the flow of traffic" and that the "work was for the benefit of the general public, and the abutting owners received no special benefit."

We can understand the potency of an argument that once a street is paved the cost of maintaining it should be borne by the public. Although we cannot agree that keeping a street in good repair is of no special benefit whatever to the property it bounds, we think that the power to maintain and assess the cost to adjacent property must be found in the charter, and in our search we have not discovered that the municipality was granted the power to "resurface" and assess the costs as in the case of original or new construction. There is no doubt that the city could grade, [fol. 37] pave and macadamize and it is clear from the use of the prefix "re" that grading, paving and macadamizing could be done again or anew and liens placed on the

property to cover the cost. Presumably a street could so deteriorate that it would be necessary to repeat the work that had made it a graded, paved or macadamized way for the use of vehicles. But we agree with the circuit judge that "surfacing" is not a synonym of the other gerunds used in the act. Definitions of the words "surface" and "surfacing" appearing in available dictionaries indicate that they describe a face or covering of a body as distinguished from the other dimensions. To surface, according to one authority, is to make smooth, or put a surface on, such as "surface a road." Thorndike-Barnhart dictionary. The total application consisted of a coating an inch and a half in thickness, and when this work is considered with the nature of a street, it seems to us that the circuit judge was not illogical in his holding that the layers were to make smoother a street worn by traffic, and that the improvement was in effect maintenance as distinguished from construction or *re*construction.

In conclusion we state that the word "resurfaced" was not the choice of the circuit judge. The relevant part of the resolution was that a certain street be "resurfaced * * * with approximately ½" leveling course and 1" surface course of asphaltic concrete * * * ." To do the work was within the power of the city; to assess it against abutting property was without such power.

The city had no inherent right to levy special assessments; such power could have been invested in it only by the legislature. City of Coral Gables v. Coral Gables, Inc., 119 Fla. 30, 160 So. 476. The power to assess for what was obviously repairs was lacking. The assessments were, therefore, void. The payment of assessments by some of the [fol. 38] owners would not operate as an estoppel because that doctrine is inapplicable when an assessment is void. Gulf View Apartments, Inc., et al. v. City of Venice, 108 Fla. 41, 145 So. 842. The appellees were entitled to the relief they sought and were granted.

Affirmed.

TERRALL, C.J., and ROBERTS, J., concur
THORNAL, J., concurs specially
HOBSON, DREW and O'CONNELL, JJ., dissent

THORNAL, J., Concurring Specially:

I concur in the judgment of affirmance. I agree with all of the opinion of Mr. Justice Thomas save that portion which in effect holds that the City Charter did not authorize the levy of an assessment for special benefits to particular property which might result from the "re-surfacing" of a street. In my view, authority to assess the cost of "re-macadamizing" a street is tantamount to authority to assess for "re-surfacing" a street. However, in order to justify the assessment the improvement must redound to the special benefit of the property that is being assessed. Utley v. City of St. Petersburg, 107 Fla. 6, 144 So. 58; Fisher v. Board of County Commissioners of Dade County (Fla. 1956), 84 So. 2d 572.

Here the trial judge specifically found that "the work was for the benefit of the general public, and the abutting owners received no special benefit." The record abounds in evidence more than adequate to sustain this conclusion.

For the foregoing reasons and the reasons announced by Mr. Justice Thomas on the other points, I would affirm the decree.

DREW, J., dissenting in part:

I agree with that portion of the opinion of Mr. Justice Thomas holding that the original notice of the City of Miami of its intention to construct and install the im- [fol. 39] provements which are the subject matter of this litigation was valid and effectual but I must respectfully dissent from the affirmance of the decree appealed from which holds these assessments to be invalid and void. I am impelled to this conclusion for two basic and fundamental reasons.

It is stated in the opinion of Mr. Justice Thomas "Although we cannot agree that keeping a street in good repair is of no special benefit whatever to the property it bounds, we think that the power to maintain and assess the cost to adjacent property must be found in the charter, and in our search *we have not discovered that the municipality was granted the power to 're-surface' and assess the costs* as in the case of original or new construction." I cannot

agree with this statement. Section 56 of the city charter authorizes special assessments for highway improvements which the act says embraces "the grading, paving, *repaving*, macadamizing and *remacadamizing* of highways * * * ." I don't see how the Legislature could have more clearly vested the power in the city to do the very work covered by the resolution and to make such assessments therefor against the abutting property in proportion to the benefit it receives. I think it is pertinent to note that the opinion of Mr. Justice Thomas concedes that such work was beneficial to the abutting property. The results reached turn squarely on the proposition, as I view it, that the city lacked authority to do the work which afforded the basis of the special assessment.

The words "macadamizing" and "remacadamizing" embrace the identical subject as "surfacing" or "resurfacing." "Macadamizing" a road merely contemplates or embraces a layer or surface over the rock, stone or cement which constitutes the road itself. "Macadamizing" is sometimes referred to as "slag" but may be any substance covering the top or surface of the road put there for smoothness or [fol. 40] safety. Webster's Collegiate Dictionary, Fifth Edition, describes "macadamize" as "to construct or finish a raod (sic) by packing a layer of small broken stone on a convex well-drained earth roadbed." "Macadam", according to the foregoing authority, is the "broken stone used in macadamizing." In 54 C.J.S. 890, "macadamize" is described as follows: "While it has been observed that the meaning of the word 'macadamize' is susceptible of variation, according to the particular relation in which it is employed, it is said to have a fixed and definite meaning. It has been defined as meaning to cover a road or path with small broken stones, which uniting by pressure form a smooth hard surface; to cover, as a road, way, or path, with small stones, so as to form a smooth laid surface: to cover as a roadway surface; to cover a street or road by the process introduced by Macadam, which consists of the use of small stones, of a uniform size, consolidated and leveled by heavy rollers. The term may refer not only to the kind of material to be used in covering a street or road, but also the manner in which it is to be laid."

Moreover, the pertinent portion of Section 56 of the city charter clearly and unequivocally authorizes special assessments not only for grading, paving, macadamizing of highways in the beginning but also authorizes a special assessment where it is necessary to repave or remacadamize. I don't see how the act could be any clearer with reference to this subject nor how one would go about the preparation of such a provision for inclusion in a city charter which would make it any clearer than that contained in Section 56.

Nor can the words of Section 56, viz. "pave and repave" be ignored. In essence these words mean to produce or reproduce a smooth surface so that "repave" and "resurface" would be indistinguishable within the intent and clear [fol. 41] language of the act. See 76 C.J.S. p. 1175, especially test to note 30 and 54 C.J., 401. Cf. McDonald v. Fraleigh, 86 Fla. 577, 98 So. 830, (1923).

Another basic and fundamental reason why I cannot agree to the result reached by the trial court and approved by the foregoing opinion which holds these assessments to be void is the failure of the appellees to act promptly in the matter.

Holding as we do that the original notice of the intention of the City of Miami to install these improvements and assess a portion of the cost against the abutting property was valid in all respects, the failure of the appellees to promptly assert their rights in the premises now estops them from maintaining an action, the ultimate objective of which is to declare the assessments invalid. It was the duty of the appellees to promptly assert their position when the City obtained jurisdiction of the improvement by virtue of the passage of the initial resolution and the giving of what we hold to be a valid and legal notice.

While all of the decisions of this Court may not be completely reconciled on this question, our latest expression in the case of Rosche v. City of Hollywood, 55 So. 2d 909 (Fla. 1952), clearly answers this contention adversely to the contention of appellees. In that case we made the following unequivocal holding:

> "'The defendant city also contends that plaintiffs are estopped to maintain this action for the cancella-

> tion of the special assessments for the improvements on these streets. This point, in my opinion, is well taken. Plaintiffs had direct notice of the ordinances providing for street improvements; they saw the pavement being put down and were well aware that part, or all of the cost thereof, would have probably been [fol. 42] assessed against their properties. They stood idly by when they could have filed their protests with the City Commission, or could have resorted to a Court of Equity to restrain the paving of the streets, and the levying of the assessments thereon. They remained silent for two years after the City became liable for the cost of the paving of the Streets and did nothing. Having failed to avail themselves of any of the remedies provided for their protection under the laws of Florida, and not having shown fraud or bad faith on the part of the City Commissioners in making the assessments, they should now be held to be estopped to do so. It, therefore, follows that the exceptions to the Special Master's report should be sustained and the bill of complaint dismissed."

Any other conclusion would be disastrous to the fiscal affairs of the city and could well result in municipal bankruptcy.

It is stated in the foregoing opinion of Mr. Justice Thomas: "The payment of assessments by some of the owners would not operate as an estoppel because that doctrine is inapplicable when an assessment is void." As authority for that statement the case of Gulf View Apartments, Inc., et al. v. City of Venice, 108 Fla. 41, 145 So. 842 is cited. In the cited case, however, the property owner waited nearly two years after the assessment was made to institute a suit to set it aside and the court there held, as it did in Rosche v. City of Hollywood, supra, that under the circumstances shown by the record in that case and because objections were not seasonably filed, the owner was estopped to question the validity of the assessment. The property owner in that case had never paid any portion of the assessment and the only reference in the opinion concerning estoppel in instances where the assessment is

[fol. 43] wholly void is the gratuitous statement "We are conscious of the rule to the effect that the doctrine of estoppel has no application where an assessment is void." In the companion case of City of Miami v. Hamilton, et al., now also under consideration by us, it appears that some of the property owners have paid either all or a portion of these assessments and the court in its decree has retained jurisdiction with reference to these payments, obviously for the purpose of later providing for their repayment by the city to the property owners. It is extremely doubtful even in the case of a void assessment whether the property owner may recover such assessment even though he may not be estopped from denying his liability for the balance. McQuillin on Municipal Corporations, (3rd Ed.), Vol. 14, Sec. 38.194.

I, therefore, respectfully dissent and would reverse the decree appealed from.

IN THE SUPREME COURT OF FLORIDA

Case No. 28,058

CITY OF MIAMI, a municipal corporation in Dade County, existing under the laws of the State of Florida, Appellant,

vs.

THOMAS B. HAMILTON, et al., Appellees.

OPINION Filed January 30, 1957

An Appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

PER CURIAM.

Affirmed on authority of The City of Miami v. Norton R. Ganger and L. C. Bethart, et al., filed this date.

TERRELL, C.J., THOMAS, ROBERTS and THORNAL, JJ., concur
HOBSON, DREW and O'CONNELL, JJ., dissent

DREW, J., dissenting:

I respectfully dissent for the reasons stated in City of Miami v. Norton R. Ganger and L. C. Bethart, et al., opinion filed this date.

[fol. 44]

IN THE SUPREME COURT OF FLORIDA

PETITION FOR REHEARING IN CASE NO. 28,057

To the Honorable Justices of the Supreme Court of the State of Florida:

Petitioner, City of Miami, a municipal corporation existing under the laws of the State of Florida, files this its petition for rehearing respectfully requesting this Honorable Court to reconsider its Opinion filed in this cause January 30, 1957, affirming the decree of the lower court. As grounds for rehearing Petitioner suggests the following:

1. That Justice Thornal Concurring Specially overlooked or failed to consider that appellees disregarded or ignored their remedies as provided by the legislature to question the benefits of the assessments and that therefore they waived their right and are estopped to question benefits in a subsequent action. This Court has so held in a long line of decisions. See: *Summerland* vs. *City of Punta Gorda*, 101 Fla. 543, 134 So. 611; *Rosche* vs. *City of Hollywood*, 55 So. 2d 909; *Escott* v. *City of Miami*, 107 Fla. 273, 144 So. 397; *City of Hollywood* v. *Davis*, 19 So. 2d 111.

The facts of the instant case make the principles of law in the case of *Fisher* v. *Board of County Commissioners of Dade County* (Fla. 1956), 84 So. 2d 572 inapplicable, for the Fisher case involved the validity of a bond issue where the proceeds of the sale of the bonds, if valid, was to be used for paving and drainage. The improvements were not yet constructed and action was timely taken by the taxpayer.

In the case at bar, the appellees failed to comply with the procedure as provided in the City Charter for raising the questions of benefits or to maintain subsequent action as provided in the Charter and they are therefore now estopped from raising the question of benefits. The Commis-

sion of the City of Miami is the legislative body of said City [fol. 45] and its legislative determination of benefits is conclusive in absence of fraud or bad faith or timely petition. See: Point Two of Appellant's Brief, pp. 17 to 22.

See also: Section 56 (N) of the Charter of the City of Miami and Section 129 of the Charter of the City of Miami which read as follows:

> "Sec. 129. Same— When confirmation of assessment roll conclusive.
>
> "The confirmation of an assessment roll by the commission under paragraph (q) of section 56 of the charter shall be final and conclusive as to the assessment against each lot and parcel assessed unless proper steps be taken within twenty (20) days in a court of competent jurisdiction to secure relief. (C. 14229, Acts 1929.)"

In this connection Justice Thornal overlooked or failed to consider that if, in making special assessments, due notice was accorded the property owners by the City of Miami as required by the Charter as held in the opinion of Justice Thomas, then in that event all provisions of organic law that pertain to due process were complied with. We find the law in Florida and elsewhere to be that when this requirement has been met the assessed property owners are also compelled to meet the requirements of the Charter with respect to the time and manner of questioning benefits or any other right afforded them by law, See: *Anderson* v. *City of Ocala,* 67 Fla. 204, 64 So. 775, 52 L.R.A. (N.J.) 287.

2. The Court in its opinion by the Honorable Justice Thomas in arriving at its decision overlooked or failed to consider that the City of Miami had the Charter power to "*re-surface*" under the provisions of Section 56 of the City Charter, Chapter 10847, Laws of Florida, Special Acts of 1925, as amended, *and to assess therefor.*

In said Section 56 under a paragraph entitled, "*Class 1.*" the City had the power to do the following:

> ". . . grading, paving, re-paving, macadamizing and re-macadamizing of highways. . . ."

[fol. 46] *and to assess therefor.*

Under Section 117 of said Charter an additional definition of what is embraced is set forth and this reads as follows:

"Sec. 117. Same— What embraced in highway improvements.

"Highway improvements made under section 56 of the city charter may include sanding and oiling of highways as all or a part of any such improvements. (C. 14229, Acts 1929)."

It is our contention that the words in Section 56 of the Charter, "grading, paving, re-paving, macadamizing and re-macadamizing of highways", as well as the words of Section 117 of "sanding and oiling of highways" includes "*surface or re-surface.*"

We predicate this conclusion not only upon legal definitions but engineering as well for these terms are engineering in nature.

In *Heofer* v. *Milwaukee* (Wis.) 143 N.W. 1038, 1040, it was held that the word "pavement" includes all things necessary to make a level *surface* for horses and foot passengers of any convenient material and all necessary excavation or filling to prepare the *surface* and the removal of obstacles as well as laying and paving stones or other *surface* material.

In the case of State Highway Commission v. Coahoma County, (Miss.) 32 So. 2d 555, 561, the phrase "pavement on the highway" was meant to include whatever "was necessary to put the old unpaved highway in order to make it a modern paved highway—it meant that which was necessary to do in order to convert the old unpaved highway into a modern paved highway . . ."

Elliott on Roads and Streets, p. 617, defines pavement as:

"Pavement is not limited to uniformly arranged masses of solid material, or blocks of wood, brick, or stone, but it may as well be formed of pebbles, or gravel, or other hard substances which will make a compact, even, hard way or floor."

[fol. 47] It would appear from a casual inspection of the foregoing citation that the making of a "compact even, hard way or floor" is making a *surface*.

If the City has the power to pave and re-pave, then certainly by the foregoing definitions we submit that is tantamount to the power to surface and re-surface.

In the case of Mobile v. Mobile Light Co. (Ala.) 38 So. 127, the Court in its opinion by way of obitor (sic) dictum expressed the opinion that paving is not limited to merely the preparation of the foundation for the reception of the pavement but include curbing and certain kinds of drainage as well.

In *Pearce, et al., v. Courillon, Tax Collector*, (La.) 113 So. 301, the Court in its opinion used the words "*surface of pavement*" interchangeably as synonymous.

For the benefit of the Court we cite the following concerning engineering definitions:

Highway Engineering, (Ritter & Paquette) p. 387

"The principal elements of (flexible pavement) structure are shown to be the pavement of "*wearing surface*," base, and subgrade.

"Page. 453: Macadam Roads—Chapt. 14. The term 'macadam', as applied to roads in the United States at the present time, has come to *mean road surfaces and bases* which are constructed of crushed or 'broken' stone fragments cemented together by the action of traffic or rolling and water. This term is also applied to *broken-stone surfaces and bases* in which the aggregate particles are bound together by Portland cement or bituminous materials.

"Page 455: By 'treated' macadam is generally meant construction involving the use of a macadam base course covered by a *bituminous wearing surface of some type*.

* * * * * * *

"Two of these types are of considerable prominence in modern highway practices. These types are the water-bound macadam, which is generally used in

the construction of bases, and bituminous macadam, which is used both in *base and surface construction*. The bulk of the following discussion will be devoted to these two types. Traffic-found macadam surfaces are still used in certain sections, particularly in the construction of certain secondary roads, and a very [fol. 48] few states use this type of macadam as a step in stage construction, the wearing surface becoming a base for a bituminous wearing *surface* after it has been satisfactorily compacted under traffic action.

"Page 458: Water-Bound Macadam—As has been indicated, water-bound macadams are *road bases* (*or surfaces*) which are constructed from crushed slag, cemented together by stone or slag dust, and water. Limestone or dolomite are generally preferred when crushed stone is used because the dust produced by the crushing of these materials has some natural cementing properties. Many other types of stone have been used successfully however, including granite, traprock, and similar hard stones, and such relatively soft materials as limerock. Crushed and uncrushed gravels have also been used in this type of construction. Water-bound macadams are constructed in thicknesses ranging from about 3 to 12 inches depending on the purpose for which they are intended. Their principal use is as bases for flexible pavements, although their use as surface courses is permitted in some states. In almost all cases water-bound macadam layers are covered with a bituminous *wearing surface* of some sort soon after their construction, and the following discussion is primarily based on the assumption that the water-bound macadam will serve as a base course. Where the thicknesses of the completed macadam is to be more than about 6 inches, it is generally constructed in two or more courses."

We submit that by the foregoing the Court overlooking or failing to consider the Charter powers herein cited as

well as the definitions of the terms contained therein the majority opinion of the Court written by Justice Thomas is in error.

Wherefore, Appellant prays that a re-hearing be granted and that the opinions of the majority of this Court be reconsidered and that a decision of this Court be rendered for the Appellant reversing the Chancellor.

Respectfully submitted,

Olavi M. Hendrickson, City Attorney, Robert M. Haverfield, Special Counsel, John H. Smith, Assistant City Attorney, By John H. Smith, Counsel for Petitioner.

(Certification of delivery omitted.)

[fol. 49]

IN THE SUPREME COURT OF FLORIDA

PETITION FOR REHEARING IN CASE NO. 28058

To the Honorable Justices of the Supreme Court of the State of Florida:

Petitioner, City of Miami, a municipal corporation existing under the laws of the State of Florida, adopts and files in this cause that Petition for Rehearing as filed in the case of The City of Miami, a Municipal corporation, Appellant vs. Norton R. Ganger and L.C. Bethart, et al., Case No. 28,057.

Respectfully submitted,

Olavi M. Hendrickson, City Attorney, Robert M. Haverfield, Special Counsel, John H. Smith, Assistent City Attorney.

By /s/ John H. Smith, Counsel for Petitioner.

(Certification of delivery omitted.)

IN THE SUPREME COURT OF FLORIDA

ORDER GRANTING PETITION FOR REHEARINGS May 10, 1957

The order entered in the above cause on May 8th is amended so as to read as follows:

The attorneys for appellant have filed a petition for rehearing in this cause and the same having been duly considered, it is ordered that said petition be and the same is hereby granted and the cause is set down for reargument at 9:00 o'clock a.m. on Monday, May 27th, 1957, before the Court en banc.

[fol. 50] The order entered in the above cause on May 8th is amended so as to read as follows:

The attorneys for appellant have filed a petition for rehearing in this cause and the same having been duly considered, it is ordered that said petition be and the same is hereby granted and the cause is set down for reargument at 9:00 o'clock a.m. on Monday, May 27th, 1957, before the Court en banc.

IN THE SUPREME COURT OF FLORIDA

Case No. 28,057

An Appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

OPINION ON REHEARING GRANTED—Filed October 11, 1957

DREW, J.

The answer to the question of whether the City had the power to repair the streets in the manner described in the opinion by Mr. Justice Thomas and to assess a portion of the cost thereof against the abutting property owners is found in the clear and unequivocal language of Section 56 of the city charter.[1] This legislative act provides "A local improvement is an improvement defined by this section and made under the provisions hereof." It further describes the classes of improvements "authorized to be [fol. 51] made under the provisions of this act." There are five classes of improvements so designated but for the pur-

[1] Ch. 10847, Special Acts of 1925.

pose of this discussion, we need concern ourselves directly only with class one. The following is the exact language of the city charter describing an authorized improvement under the act for which special assessments for benefits may be made.

> "Class 1. Highway improvements embrace the grading, paving, *re-paving,* macadamizing and *re-macadamizing* of highways, with necessary drainage, sewer inlets, manhole and catch basins and, if the Commission so orders, may embrace curbs and gutters." (Emphasis supplied)

There are many significant words in this quotation. The first word is "improvement". This clearly symbolizes making better something which already exists. Webster, among other things, defines "improvement" as "betterment" and "state of being improved". The language of the act provides not merely for grading, paving and macadamizing a street but also uses the words "re-paving" and "re-macadamizing". This is a clear legislative grant of power to do exactly what was done in the instant case. It is difficult to understand what words the Legislature could have used which would more clearly have vested the power in the City to do the work covered by the resolution and make assessments therefor against the abutting property. The words "macadamizing" and "re-macadamizing" embrace the identical subject as "surfacing" or "re-surfacing". "Macadamizing" a road merely contemplates or embraces a layer or surface over the rock, stone or cement which constitues (sic) the road itself. "Macadamizing" is sometimes referred to as "slag" but may be any substance covering the top or surface of the road put there for smoothness or safety. Webster's Collegiate Dictionary, Fifth Edition, describes "macadamize" as "to construct or finish a road by packing a layer of small broken stone on a convex well-drained earth roadbed." "Macadam", ac- [fol. 52] cording to the foregoing authority, is the "broken stone used in macadamizing." In 54 C.J.S. 890, "macadamize" is described as follows: "While it has been observed that the meaning of the word 'macadamize' is susceptible of variation, according to the particular relation

in which it is employed, it is said to have a fixed and definite meaning. It has been defined as meaning to cover a road or path with small broken stones, which uniting by pressure form a smooth hard surface; to cover, as a road, way or path, with small stones, so as to form a smooth laid surface; to cover as a roadway surface; to cover a street or road by the process introduced by MacAdam, which consists of the use of small stones, of a uniform size, consolidated and leveled by heavy rollers. The term may refer not only to the kind of material to be used in covering a street or road, but also the manner in which it is to be laid." Moreover the words used in the quoted section of the city charter "pave and re-pave" are of significance to this discussion. In essence these words mean to produce or re-produce smooth surface so that "re-pave" and "re-surface" would be indistinguishable within the intent and clear language of the act. See 76 C.J.S., p. 1175, especially text to note 30 and 54 C.J. 401 C.F. McDonald v. Fraleigh, 86 Fla. 577, 98 So. 830 (1923). It may not appeal to some to allow a city to assess for the cost of re-paving or re-surfacing a street but it is unquestionably within the power of the Legislature to authorize such to be done. We re-iterate that such power could hardly have been vested in language of clearer import and meaning than that contained in the city charter.

Holding then, as we unanimously do, that the notice discussed in the opinion by Mr. Justice Thomas was in all respects regular and in full compliance with the provision of the city charter relating to special assessments for benefits, we now direct our attention to the requirements placed by the law upon the property owner if he desires [fol. 53] to contest the regularity of the proceedings, the power of the city to make the assessments or the amount of the assessments determined to be chargeable against the respective parcels of land.[2]

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[2] The resolution authorizing the work and establishing the highway improvement tax district was adopted November 19, 1952. This suit in equity was commenced April 1, 1954.

The resolution was approved by the City Commission after a hearing on December 3, 1952 at which no objections were offered.

Bids were advertised for, contracts awarded and the improvements completed. The Clerk published notice prior to a hearing

This is not the first time this section 56 of the city charter has been before this Court; nor is it the first time we have had occasion to deal with the duty and responsibility of the property owner to promptly object to the city commission if he has a grievance with reference to a proposed improvement. In Escott v. City of Miami, 144 So. 397 (Fla. 1932), in speaking of this identical section of the city charter, after holding the original notice to have been validly given, we said:

> "If the property owner had notice, and in this case we have held that he did have, his *only* method of questioning any error or irregularity in the proceedings was by filing objections before the city commission, and, if overruled there, by filing his special appeal to the circuit court, in the manner provided by the charter.
>
> "Where a property owner has an opportunity given him, under a statute providing for special assessments for local improvements, to appear and contest the question before the local authorities whose duty it is [fol. 54] to pass upon objections, *their determination on the subject of benefits is final, and, if he fails to avail himself of the opportunity provided by the statute, he thereby admits the finality of the determination, and is estopped to raise the question in subsequent proceedings, such as by suit in equity to enjoin the enforcement of assessments which have become conclusive under the statute.*" (emphasis supplied)

See also Rosche v. City of Hollywood, 55 So. 2d 909 (Fla. 1952) and Summerland, Inc. v. City of Punta Gorda, 134 So. 611 (Fla. 1931).

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on June 3, 1953, where no objections were made to the improvements, and they were then accepted.

After a preliminary tax roll had been prepared, the clerk published notice of a hearing on February 3, 1954 for objections to confirmation of the roll. At the hearing, where there were no objections, the City Commission confirmed the assessments, finding: "That the sums and amounts assessed against each of the lots or parcels of ground in said preliminary rolls are less than the amount that each of the said lots or parcels of ground is especially benefited by said improvement and that such amounts are in proporation to the special benefits that the property received. . . ."

Section 56 of the charter of the City of Miami provides in detail the steps to be taken by the City officials in authorizing public improvements, the cost of which are to be paid in whole or in part by the owners of the land abutting said improvements and especially benefited thereby. The various notices required to be published are for the purpose of advising the property owners affected of the nature and extent of the improvements, the extent of the assessments to be made against the land to be especially benefited thereby and the details of such construction so that the affected property owners may be fully advised as to what is contemplated, the approximate cost of the improvement and the approximate amount to be ultimately assessed against the affected property. These requirements of the charter serve not only to protect the property owner by giving him notice of contemplated improvements so that he may take timely action either before the City commission or in the courts to protect his interest in the matter but it serves also to afford the municipal government the opportunity of financing such improvements and a means of setting in repose questions of the validity of such proceedings and the assessments to be made pursuant thereto. Such proceedings serve much the same purpose as validation proceed- [fol. 55] ings under Chapter 75, F.S.A. Both are necessary to the efficient and orderly financing of civic improvements and are a necessary adjunct of fiscal management. It would be disastrous to the fiscal affairs of the City and detrimental to the general welfare of its citizens if the validity of such assessments was constantly open to question. The orderly administration of the affairs of the city require that the property owner make timely objection and it imposes no undue burden on him to do so. We specifically pointed out in Summerland, Inc. v. City of Punta Gorda, supra, that a property owner who stands by and permits a public improvement to be made to the benefit of his property under authority of a tribunal vested with the power to levy such assessment may be estopped from raising objections thereto by sleeping on his rights and not promptly asserting them even though had they been timely raised, such objections might have rendered the assessment invalid. The failure of the property owners here to promptly assert

whatever rights they had or make any effort to comply with the applicable provisions of the city charter now estops them from questioning the validity or amount of these assessments.

I am authorized to say that Mr. Justice Hobson, Mr. Justice Thornal and Mr. Justice O'Connell concur in these views.

The judgment appealed from is reversed with directions to dismiss the complaint.

HOBSON, THORNAL and O'CONNELL, JJ., Concur.
TERRELL, C. J., THOMAS and ROBERTS, JJ., Dissent.

THOMAS, J., Dissenting:

The appellant by resolution created a Highway Improvement District, published a notice that at a designated time [fol. 56] "objections would be heard to the confirmation of such resolution," to quote from the decree, and subsequently improved a certain street described in the resolution and the notice by applying a one-half inch "leveler" course and a one inch surface course. The base of the street and the curbs and gutters were not disturbed. In other words, the city resurfaced the existing street and undertook by the resolution to charge and cost, except for improving the intersections, to the abutting owners.

The judge decided that the notice was insufficient and that the appellant lacked the authority to impose the cost of an improvement of this nature upon the property owners. He appointed a master to ascertain what amounts had been paid by the various owners on the liens that had been filed to secure payment of the assessments, evidently with the view of later ordering the owners reimbursed.

We will detail the reasons for the rulings as we discuss the questions presented in the briefs.

The appellant claims that authority for the procedure was granted by Sec. 56 of the city charter, Chapter 10847, Laws of Florida, Special Acts of 1925, as amended. In that act we find that the city has the power to grade, pave, re-pave, macadamize and re-macadamize streets and specially assess the cost against adjacent property. Improvements and the eventual assessments are initiated by

resolution of the city commission defining the termini and routes and the character of the work proposed.

After adoption of the resolution, plans and specifications for the work showing the estimated cost are prepared by the manager and filed with the city clerk. When these are filed, the clerk is required to publish "once in a daily newspaper of general circulation" a notice that at a meeting of the commission "on a certain day and hour" objections of interested persons to the confirmation of the [fol. 57] resolution will be heard. The notice must contain, though it may be in brief or general terms, the description and location of the improvement and a statement that plans, specifications and estimates have been filed.

So to generate the power vested by the statute, the resolution must be adopted, and to secure due process to those who must pay the cost, or whose property will be responsible for it, the notice defined in the law must be given.

The notice involved in the instant litigation follows: "All interested will take notice that a meeting of the City Commission at 9:30 o'clock A.M. December 3rd, 1952, their objections will be heard to the confirmation of Resolution No. 25006, adopted November 19th, 1952 ordering paving improvements on South Miami Avenue, from S.W. 15th Street Road to 200′ more or less south of Alatka Street, designated improvement H-503.

"Plans, specifications and estimate of cost of said improvements are on file in the City Clerk's office.

November 22, 1952.

F. L. Correll, City Clerk."

When we place side by side the relevant section of the charter and the notice we have fully quoted, it is plain to us that the latter contained all elements required by the statute. It was published once in a newspaper of general circulation, The Miami Herald; it carried the date and hour of the meeting of the city commission at which complaints would be entertained; it contained a brief general description of the location where the improvement would be made; and it included the statement that the plans, specifications and estimates had been filed with the clerk.

The appellees seem to have convinced the circuit court that there were five defects rendering the notice insufficient: (1) failure to mention the place, that is, the city, where the objections would be heard, (2) absence of the name of the city commission which would hear the, (sic) (3) omission [fol. 58] of the name of the city where the streets lay; (4) want of identity of the signatory; (5) insertion of the notice in the classified section of the Herald.

The law only requires that persons interested be notified that protests will be heard at a meeting of the commission, and that the day and hour the commission will meet for the purpose be shown. No mention is made about naming in the notice the place where the commission would hold the particular meeting.

It seems to us that an interpretation that a property owner who wished to object to the proceeding would not be sufficiently informed to be able to locate a meeting of the commission of the city of Miami would be far-fetched. We have the same view about the complaint that the commission that would hear the complaints was not named. In the description of the street appears the familiar title "South Miami Avenue," and the notice appeared in The Miami Herald. We apprehend that few citizens of this state and no owners of property in Miami at all, expecially (sic) on Miami Avenue between S.W. 15th Street and the vicinity of Alatka Street, would be unaware that these titles pertain to that city. We conclude that anyone purchasing an edition of the Herald and reading the notice would be fully conscious of the nature, place and purpose of the meeting.

Our reaction to the next two so-called imperfections, lack of identity of the city and the signer of the notice, is the same for the same reasons.

As for the position in the paper, among the classified advertisements, we simply say that the publication is the test and that there is no requirement that the notice shall appear in any special section of the newspaper. Actually the notice did appear under the caption "Classified Information" but immediately above it was the title "Legal Notices." We think this position was quite appropriate.

[fol. 59] "The purpose of notice under proceedings of this kind is to secure to the owner the opportunity to protect

his property from lien of the proposed tax * * * and, in order to be effectual, it should be so full and clear as to disclose to persons of ordinary intelligence *in a general way* what is proposed and when and where property owners may be heard." (Italics supplied.) Escott v. City of Miami, 107 Fla. 273, 144 So. 397.

We consider that the notice substantially conformed to the statute and that any protestant was advised when he could appear and where he could get full information about the contemplated work inasmuch as the plans, specifications and estimates were shown to be on file in the clerk's office and to relate to a certain numbered resolution dealing with improvement of a stated street.

All members of the court agree to the preceding opinion with reference to the sufficiency of the notice but the opinion which follows is that only of Terrell, C.J., Roberts, J., and the writer. Although we three cannot adopt the view that the property owners could ignore the notice and at this late date successfully attack the action of the city, on the ground that due process had not been afforded them, we believe that the property owners can assail the liens on the ground that the city did not have the power to create them under the circumstances.

The chancellor thought that "*resurfacing* was necessary to keep the street in repair and facilitiate the flow of traffic" and thah (sic) the "work was for the benefit of the general public, and the abutting owners received no special benefit."

We can understand the potency of an argument that once a street is paved the cost of maintaining it should be borne by the public. Although we cannot agree that keeping a street in good repair is of no special benefit whatever to the property it bounds, we think that the power to maintain and assess the cost to adjacent property must be found [fol. 60] in the charter, and in our search we have not discovered that the municipality was granted the power to "re-surface" and assess the costs as in the case of original or new construction. There is no doubt that the city could grade, pave and macadamize and it is clear from the use of the prefix "re" that grading, paving and macadamizing could be done again or anew and liens placed on the

property to cover the cost. Presumably a street could so deteriorate that it would be necessary to *re*peat the work that had made it a graded, paved or macadamized way for the use of vehicles. But we agree with the circuit judge that "surfacing" is not a synonym of the other gerunds used in the act. Definitions of the words "surface" and "surfacing" appearing in available dictionaries indicate that they describe a face or covering of a body as distinguished from the other dimensions. To surface, according to one authority, is to make smooth, or put a surface on, such as "surface a road." Thorndike-Bernhart dictionary. The total application consisted of a coating an inch and a half in thickness and when this work is considered with the nature of a street, it seems to us that the circuit judge was not illogical in his holding, based on the testimony of experts, that the layers were to make smoother a street worn by traffic, and that the improvement was in effect maintenance as distinguished from construction or *re*-construction.

In conclusion we state that the word "resurfaced" was not the choice of the circuit judge. The relevant part of the resolution was that a certain street be "resurfaced * * * with approximately ½" leveling course and 1" surface course of asphaltic concrete * * *." To do the work was within the power of the city; to assess it against abutting property was without such power.

The city had no inherent right to levy special assessments; such power could have been invested in it only by the legislature. City of Coral Gables v. Coral Gables, Inc., [fol. 61] 119 Fla. 30, 160 So. 476. The power to assess for what was obviously repairs was lacking. The assessments were, therefore, void. The payment of assessments by some of the owners would not operate as an estoppel because that doctrine is inapplicable when an assessment is void. Gulf View Apartments, Inc., et al. v. City of Venice, 108 Fla. 41, 145 So. 842. We three are convinced that appellees were entitled to the relief they sought and were granted.

Therefore we dissent.

Terrell, C.J., and Roberts, J., Concur.

IN THE SUPREME COURT OF FLORIDA

Case No. 28,058

CITY OF MIAMI, a municipal corporation in Dade County, existing under the laws of the State of Florida, Appellant,

vs.

THOMAS B. HAMILTON, et al., Appellees.

An appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

PER CURIAM OPINION Filed October 11, 1957

Reversed on the authority of City of Miami v. Ganger, opinion filed this date.

Terrell, C.J., Thomas, Hobson, Roberts, Drew, Thornal and O'Connell, JJ., concur.

IN THE SUPREME COURT OF FLORIDA

MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL

The Appellees respectfully show that:

1. Subsequent to the oral argument herein, Appellees learned that the Appellant City had created at least two new Highway Improvement Districts H-508 and H-511. The work done in these districts is almost identical in [fol. 62] character with that done in Districts H-477 and H-503, which are involved in the above appeal. Certified copies of the proceedings relating to District H-511 and Resolution #27362 evidencing that the work done in District H-511 was not the subject of special assessments are attached to this motion.

2. The lower Court on Appellees' Motion, a copy of which is attached, in an order dated August 13th, 1956, permitted the Appellees to take the deposition of Appel-

lant's Finance Director, concerning the payment of the costs of District H-511.

3. The deposition of George N. Shaw, Director of Finance, for said City, was taken on August 23, 1956, pursuant to that order and is attached. This deposition reveals that the work in said districts was paid for from the proceeds of bonds issued by the City, and which bonds are payable out of the proceeds derived from a franchise given to the Florida Power & Light Company.

5. The policy of the City with respect to this and other work is reflected by a memorandum from the Director of Finance, reading as follows:

"Mr. G.N. Shaw, Director
Finance Department

June 1, 1956

Arthur E. Darlow, Director
Department of Engineering

H. 508 District Non Assessable

On December 20, 1955, a memorandum was directed to you advising that Highway Improvement District H-508 was to be an assessment district.

My attention has been called to the fact that the City Commission, at about the time this district was ordered, verbally declared all resurfacing work paid out of Florida Power and Light Bond Funds was *not* to be assessed.

Consequently after the district was ordered and confirmed, we purposely failed to adhere to the charter requirement of hearing objections to the completed work. This, in effect, made the district invalid as far as assessments were concerned.

Although pending liens exist against the District's properties, the City Attorney's office, upon being contacted to determine the method of removing the liens, deemed such action inadvisable at that time because of litigation of other districts of a similar nature.

[fol. 63] As soon as clearance is received from the Law Department, we will arrange to have the pending liens removed by Commission Action.

AED:MES:rp

cc: H-508
City Atty.
Design
Assessment"

6. It would be manifestly unfair for the City to be permitted to resurface such streets as South Miami Avenue and to charge the cost against the abutting owners and to resurface streets leading into South Miami Avenue and pay for the cost out of General Funds. This is the rankest sort of discrimination and completely refutes the contention of the Appellant as to the importance of this case upon other city operations.

7. Because of the importance of these factors in a consideration of this case, it is respectfully requested that the Appellees be permitted to supplement the record on this appeal with the matters and things set forth in said deposition and this motion.

Respectfully submitted,

/s/ Thomas H. Anderson

Anderson & Nadeau, Attorneys for Appellees, 908 First National Bank Building, Miami 32, Florida.

(Certification of mailing omitted.)

ATTACHMENT TO MOTION

Excerpts of the Minutes of the Regular Meeting of the Commission of the City of Miami, Florida.

On the 20th day of April, 1955, the Commission of the City of Miami, Florida, met at its regular place of meeting in Room 306, Dade County Courthouse, in regular session. The meeting was called to order at 9:33 o'clock [fol. 64] A.M. by Chairman Abe Aronovitz, and on roll call the following members of the Commission were found to be present:

Messrs. Christmas, Hearn, Quigg, Senerchia and Aronovitz.

* * * * * * *

Ordering Local Improvement H-511

The following resolution was introduced by Mr. Quigg, who moved its adoption:

Resolution No. 27240

A Resolution Ordering Local Improvement H-511

Be It Resolved by the City Commission of the City of Miami:

That a local improvement, described and designated as follows, shall be made:

Highway Improvement District H-511, as follows; on:

(a) S.W. 7th St. (S. W. 3rd Ave.—S.W. 17th Ave.)

This street shall be resurfaced from curb to curb with 1½ surface course of asphaltic concrete including returns and and intersections.

(b) S.E. 7th St. (S. Miami Ave.—Brickell Ave.)

(c) S.W. 7th St. (S.W. 2nd Ave.—S.W. 3rd Ave.)

(d) N. Miami Ave. (N. 20th St.—N. 36th St.)

(e) N.W. 22nd St. (N.W. 2nd Ave.—N.W. 5th Ave.)

These streets shall be resurfaced from curb to curb with a 1" minimum, leveling course and a 1" surface course of asphaltic concrete including returns and intersections.

Upon being seconded by Mr. Christmas the resolution was passed and adopted by the following vote—Ayes: Messrs. Christmas, Hearn, Quigg, Senerchia and Aronovitz. Noes: None.

Mr. Senerchia stated it was his understanding that the Commission had agreed not to assess property owners for a proportionate share of the cost of any resurfacing [fol. 65] of streets, and requested that any reference to

assessments for the cost of this improvement be stricken from the resolution, which was agreed to prior to roll call on the resolution.

* * * * * * * *

Adjournment: There being no further business to come before the Commission at this time, on motion duly made and seconded, the meeting was adjourned at 4:54 o'clock P.M.

(Certification of City Clerk's office omitted.)

ATTACHMENT TO MOTION

Resolution No. 27240

A Resolution Ordering Local Improvement H-511

Be it Resolved by the City Commission of the City of Miami:

That a local improvement, described and designated as follows, shall be made:

Highway Improvement District H-511, as follows; on:

(a) S.W. 7th St. (S.W. 3rd Ave.—S.W. 17th Ave.)

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(b) S.E. 7th St. (S. Miami Ave.—Brickell Ave.)

(c) S.W. 7th St. (S.W. 2nd Ave.—S.W. 3rd Ave.)

(d) N. Miami Ave. (N. 20th St.—N. 36th St.)

(e) N.W. 22nd St. (N.W. 2nd Ave.—N.W. 5th Ave.)

These streets shall be resurfaced from curb to curb with a 1" minimum, leveling course and a 1" surface course of asphaltic concrete including returns and intersections.

Upon being seconded by Mr. Christmas the resolution was passed and adopted by the following vote—Ayes:

Messrs. Christmas, Hearn, Quigg, Senerchia and Aronovitz. Noes: None.

[fol. 66] Mr. Senerchia stated it was his understanding that the Commission had agreed not to assess property owners for a proportionate share of the cost of any resurfacing of streets, and requested that any reference to assessments for the cost of this improvement be stricken from the resolution, which was agreed to prior to roll call on the resolution.

* * * * * * *

Adjournment: There being no further business to come before the Commission at this time, on motion duly made and seconded, the meeting was adjourned at 4:54 o'clock P.M.

* * * * * * *

CLERK'S NOTE RE CONSOLIDATION

The following petition for rehearing and all subsequent papers filed and orders entered by the Supreme Court of Florida bore a consolidated caption and but a single order was entered in the causes as consolidated.

IN SUPREME COURT OF FLORIDA

PETITION FOR REHEARING IN CASE NO. 28057 AND CASE NO. 28058

The Court, in reversing itself on rehearing granted, overlooked or failed to consider the following several points:

1. In holding that the appellees were estopped from challenging the validity of the assessment because they failed to follow the administrative procedure prescribed in the Charter, the Court overlooked or failed to consider:

(a) That this omission appeared on the face of the complaint, as amended;

(b) That as a result of a prior opinion of this Court, 67 [fol. 67] So. 2d 430, the City was given leave to move against the complaint, as amended;

(c) That in such motion the City expressly raised the question as to this estoppel;

(d) That the motion was denied;

(e) That the City took an interlocutory appeal, and on that appeal expressly raised the question of estoppel;

(f) That this Court affirmed the decree thereby adjudicating the sufficiency of the complaint, as amended.

This decision established the law of the case, and therefore the sufficiency of the complaint, as amended, is no longer open to question.

Hamel v. *Danko,* (Fla.) 82 So. (2) 321 (per Drew, J.)

See also: Dissenting opinions Justices Drew and Thornal, *Goldshalk* v. *City of Winter Park,* (Fla.) 95 So. (2) 9.

To hold now, after expensive and lengthy litigation, that the property owners are estopped to complain, and that the complaint is insufficient is plainly contrary to law and justice and overrules a long line of decisions, namely:

Family Loan & Smetal (sic) *Corporation,* 123 Fla. 900, 169 So. 48

Higbee et al. v. *Housing Authority of Jacksonville,* 143 Fla. 560, 197 So. 479

Oates v. *New York Life Ins. Co.* 144 Fla. 744, 198 So. 681

Jayner v. *Bernard,* 160 Fla. 681, 36 So. (2) 364

2. In holding that the property owners were estopped to attack the assessments for want of benefits, because they did not file their action in the Circuit Court within the time fixed by the Charter (10 or 20 days), the Court overlooked the fact that the property owners never had notice of the [fol. 68] confirmation of the assessment roll, and therefore had no notice of when the time for following the statutory procedure began to run. Such lack of notice is violative of procedural due process. Amd. XIV U.S. Const.

3. In holding that the Charter provisions which attempted to limit the right of property owners to attack the

validity of special assessments by a petition filed within the time, and in the manner prescribed by the Charter, the Court overlooked, or failed to consider that such provisions are unconstitutional and void.

Art. V. Sec. 11, Florida Constitution
Skinner v. *Eustis,* 147 Fla. 22, 2 So. (2) 116
State ex rel. Williams v. *Whitman,* 116 Fla. 196, 156 So. 705
Hayes v. *Douglas County,* 92 Wis. 429, 65 N.W. 482 (new)
42 Am. Jur. 551, Sec. 187

4. In holding the notice of the confirmation of the assessment roll sufficient, and that the appellees were estopped to challenge the lack of benefits because they failed to object pursuant to the notice, the Court overlooked, or failed to consider that the procedure for the imposition of assessment liens is quasi judicial and that the requirements of procedural due process guaranteed by Amd. XIV U.S. Const. must be complied with. In the case of residents, constructive notice, as attempted, is violative of the rights secured by such amendment.

Walker v. *City of Hutchinson,* 77 S.Ct. 200
Mullane v. *Central Hanover Bank & Trust Co.* et al., 339 U.S. 306

5. The Court, in holding the notice good, overlooked or failed to consider that the notice directed to all interested persons did not contain any notice or warning (even by inference) that a special assessment was going to be levied. [fol. 69] This omission was fatal.

Rafkin v. *City of Miami Beach,* (Fla.) 38 So. (2) 836
63 C.J.S. 747, Sec. 1095
Hayes v. *Douglas County,* 92 Wis. 429, 65 N.W. 482 (new)

6. In holding the notice of hearing on confirmation of the assessment roll to be sufficient, the Court overlooked or failed to consider that the notice did not comply with the Charter which expressly requires (56-1) that the notice

state that hearings be had at a "regular" commission meeting.

Merrill on Notice, Par. 754

7. In holding the notice sufficient, this Court overlooked or failed to consider that when the initial notice of hearing on confirmation of resolutions establishing the improvement districts, all of the streets were included in one notice. When notices with respect to confirmation of the assessment roll were published the district was broken down and five (5) separate notices, each relating to an isolated segment, were published. This was not in compliance with the Charter, and resulted in confusion, if not deception, as it could well have indicated abandonment of intention to levy a special assessment.

8. In holding the notice sufficient, this Court overlooked or failed to consider the fact that the City Charter and requirements of due process required that the notice state the *time* and *place* where the objectors will be heard. This the notice wholly failed to do. In so holding this Court departed from or overruled the following cases:

City of Fort Myers v. *State*, 95 Fla. 704, 117 So. 97

See also:

48 Am. Jur. 710
63 C.J.S. 1180
[fol. 70] *Merrill on Notice*, Section 520
Bellingham Bay & B.C.R. Co. v. *City of New Whatcom*, 172 U.S. 314
City of Norfolk v. *Young*, 94 Va. 728, 34 S.E. 886
McGavack v. *City of Omaha*, 40 Neb. 64 58 N.W. 543
City of Logansport, et al. v. *Pollard*, 50 Inc. 151
City and County of Denver v. *State Investment Co.*, 49 Colo. 244, 112 P. 789

9. The Court overlooked or failed to consider that the Chancellor made a finding, after a full hearing, that the assessed property owners received no benefit from the resurfacing. Thoraal, J., in his concurring opinion, found that this finding was abundantly supported by the record. Such a finding renders the assessment wholly void, discrimina-

tory, unconstitutional and void under the State Constitution, as well as the Equal Protection and Due Process Clauses of the Federal Constitution.

10. The Court overlooked or failed to consider the innumerable holdings of this and other courts that a special assessment is void unless founded upon special benefit to the abutting owners.

Village of Norwood v. *Baker*, 172 U.S. 269
Utley v. *City of St. Petersburg*, 107 Fla. 6, 144 So. 58
Rafkin v. *City of Miami Beach*, 32 So. (2d) 836
Fischer v. *Board of County Commissioners*, 84 So. (2) 572 (per Thornal, J.) (new)

11. The Court overlooked or failed to consider that where a special assessment is void for lack of benefits or otherwise, no estoppel arises.*

[fol. 71] *Finlayson* v. *Monticello*, 137 Fla. 768, 189 So. 21
Gulf View Apartments v. *City of Venice*, 108 Fla. 41, 156 So. 842
Harvey v. *City of St. Petersburg*, 138 Fla. 597, 189 So. 861
Coombes v. *City of Coral Gables*, 124 Fla. 374, 168 So. 524
Milwaukee Electric Ry. & Light Co. v. *Village of Shorewood, et al.*, (Wis.) 193

12. The Court overlooked or failed to consider the appellee's Petition to Supplement the Record by showing that since the work was done as set out in the complaint, the City has, on other occasions, done similar work in similar districts for which it made no charge to the abutting owners. This work, done by virtue of a City ordinance, is class legislation and therefore denies to the appellees the equal protection of the laws, contrary to the Amendment ambit XIV U.S. Constitution.

Utley v. *City of St. Petersburg*, 107 Fla. 6, 144 So. 58

* Likewise, lapse of time cannot give validity to a void assessment. Ward v. Board, etc. (Ct. Ct. N.J.) 93 Atl. 364.

For the reasons stated a rehearing and re-argument of this case should be had, and on such reconsideration the decree appealed from should be affirmed.

Respectfully submitted,

.....

Clyde Eppedson and Anderson & Nadeau, Attorneys for Appellees, 908 First National Bank Building, Miami 32, Florida.

(Certification of mailing omitted.)

[fol. 72]

IN SUPREME COURT OF FLORIDA

AMENDMENT TO PETITION FOR REHEARING IN CASE NO. 28057 AND CASE NO. 28058

The Appellees hereby amend their Petition for Rehearing by adding thereto paragraphs "13" and "14", as follows:

13. The Appellant has relied in this case very largely upon the holding of this Court in *Escott* v. *The City of Miami*, 107 Fla. 273, 144 So. 397. It is contended that under the doctrine of stare decisis, this Court is bound to follow the ruling stated in that case. The Appellees rely upon the doctrine of the law of this Court on the prior appeal in *City of Miami* v. *Hamilton*, 73 So. 2d 715. The rule as to the law of the case is much stronger in its application than that of stare decisis; and this is so because the former inheres in the judgment itself, while the latter is simply a guide for the determination of cases presenting similar situations. In a case wherein the justice of the situation is contrary to the rule laid down, the prior decision which is supposed to furnish a precedent, must be thrown out in the resulting conflict. Such was the holding of this Court in *Hargrove* v. *The Town of Coco Beach* (Fla.) 96 So. 2d 130 (per Thornal, J.). In this case, the Court refused to follow prior decisions saying: "Judicial consistency loses its virtue when it is degraded by the vice of injustice."

14. By Senate Bill 1337, the Florida Legislature passed an act at the 1957 Session, which confirmed all resolutions which the City Commission had passed under the provisions of Section 56 of the Charter, in attempting to order the construction of local improvements which were confirmed before January 1, 1957:

> "excepting those resolutions or proceedings and those special assessments, the validity of which, in whole or in part, was questioned in actions filed in the Circuit Court of Dade County before said January 1, 1957, * * * ."

Respectfully submitted,

.....

[fol. 73] Clyde Epperson and Anderson & Nadeau, Attorneys for Appellees, 908 First National Bank Building, Miami, Florida.

(Certification of mailing omitted.)

IN SUPREME COURT OF FLORIDA

APPLICATION TO FILE BRIEF IN CASE NO. 28057 AND CASE NO. 28058

The Appellees respectfully show to the Court that in the Petition for Rehearing substantial and grave constitutional questions concerning the legality of the notice involved in this case are raised. These questions deserve to be briefed and argued and are of sufficient importance to warrant this Court in ordering that that be done.

Wherefore, Appellees request that they be permitted to file a brief confined solely to the Federal Constitutional questions presented by the Petition for Rehearing.

Respectfully submitted,

Thomas H. Anderson

Clyde Epperson and Anderson & Nadeau, Attorneys for Appellees, 908 First National Bank Building, Miami 32, Florida.

IN SUPREME COURT OF FLORIDA

February 4, 1958

ORDER GRANTING APPLICATION TO FILE BRIEF IN CASE NO. 28057 AND CASE NO. 28058

On application of attorney for appellees in the above named consolidated causes, it is ordered that said attorney [fol. 74] be and he is hereby allowed until February 13, 1958, to file brief in this cause confined solely to the federal constitutional question presented by the petition for rehearing.

IN SUPREME COURT OF FLORIDA

ORDER DENYING MOTION ETC.—APRIL 2, 1958 IN CASE NO. 28057 AND CASE NO. 28058

The motion of appellees to amend the order denying petition to supplement record has been duly considered and is denied.

IN SUPREME COURT OF FLORIDA

ORDER GRANTING APPELLANT'S MOTION TO STRIKE APPELLEES' BRIEF ETC.—APRIL 2, 1958 IN CASE NO. 28057 AND CASE NO. 28058

The motion of appellant in the above consolidated causes for the entry of an order striking appellees' brief filed on Federal Constitutional questions raised by appellees' petition for rehearing has been duly considered and is granted.

[fol. 75]

IN SUPREME COURT OF FLORIDA

ORDER DENYING PETITION FOR REHEARING—APRIL 2, 1958 IN CASE NO. 28057 AND CASE NO. 28058

The attorneys for appellees have filed a petition for a rehearing and reconsideration of the above consolidated

causes, and, the same having been duly considered, it is ordered that said petition be and the same is hereby denied.

Chief Justice Terrell and Justices Drew, O'Connell and Thornal concurred in the order denying petition for rehearing. Justices Thomas, Roberts and Hobson dissented and voted to grant the petition.

IN SUPREME COURT OF FLORIDA

ORDER STAYING MANDATE—APRIL 2, 1958 IN CASE NO. 28057 AND CASE NO. 28058

On application of appellees, it is ordered that the mandate in the above consolidated causes be withheld in this Court for ninety (90) days from this date and the execution and enforcement of the judgments of this Court rendered in said causes on October 11, 1957 (petition for rehearing denied on this date), be and it is hereby stayed for ninety (90) days from this date to enable the appellees to have a reasonable time in which to apply for and to obtain, if they can, a review of the opinions and judgments of this Court by the Supreme Court of the United States. This order is subject to cancellation at any time if appellees fail to prosecute such proceedings for review with reasonable dispatch.

[fol. 76]

IN SUPREME COURT OF FLORIDA

No. 28,057

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice Is Hereby Given that Norton R. Ganger and L. C. Bethart, and all persons belonging to the class for whom suit was brought and who are the appellees above named, hereby appeal to the Supreme Court of the United States from the opinion and judgment entered herein on petition for rehearing granted, which opinion and judgment reversed a final decree of the Circuit Court of Dade County, Florida, dated February 17, 1955, recorded in

Chancery, Order Book 1171, Page 362 of the Public Record of Dade County, Florida. The opinion or judgment of the Supreme Court of Florida which reversed the judgment of the Circuit Court being filed with the clerk of the Supreme Court of the State of Florida on October 9, 1957. An order denying appellees' petition for rehearing, was entered on April 2, 1958.

This appeal is taken pursuant to Title 28 United States Code, Section 1257(2).

II. The clerk will please prepare a transcript of record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(The directions to the Clerk embodied in this Notice of Appeal, numbered 1 to 32, are identical with those directions to the Clerk embodied in the Notice of Appeal filed in Case No. 28,058, and are accordingly omitted from this transcript at the direction of counsel for appellant)

33. Notice of Appeal filed by Norton R. Ganger and L. C. Bethart.

[fol. 77] III. The following questions are presented by this appeal:

1. Is notice of hearing on special assessments as to resident owners whose interest, names and addresses were known by, in the possession of, and readily available to the City imposing the assessments, sufficient to comply with the requirements of the due process clause of Article XIV, Section 1, Amendments to the Constitution of the United States, where it affirmatively appeared that the notice was published only two times in the classified section of a large metropolitan newspaper, that no other or further notice was given to or served on the abutting owners, and where the trial court affirmatively found that the alleged improvement conferred no benefit upon the abutting property?

2. Where a state statute requires abutting property owners of a particular municipality to file suit in the Circuit Court of Dade County within ten (10) days of con-

firmation of the special assessment roll, and the resident property owners had no notice of any of the proceedings other than by notice of a hearing of objections to the roll published in the classified section of a local metropolitan newspaper, is such a limitation upon the right of abutting property owners to resort to the court violative of the due process and equal protection clauses of the Federal Constitution?

/s/ Thomas H. Anderson, Attorney for Appellants,
908 First National Bank Bldg., Miami 32, Florida.

Certificate of Service (omitted in printing).

[fol. 78]

IN SUPREME COURT OF FLORIDA

No. 28,058

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice Is Hereby Given that Thomas B. Hamilton and Jane Q. Hamilton, his wife, and Hunter Lyon, Inc., a Florida corporation, and all persons belonging to the class for whom suit was brought, and who are the appellees above named, hereby appeal to the Supreme Court of the United States from the opinion and judgment entered herein on petition for rehearing granted, which opinion and judgment reversed a final decree of the Circuit Court of Dade County, Florida, dated February 17, 1955, recorded in Chancery Order Book 1171, Page 385, of the Public Records of Dade County, Florida. The opinion and judgment of the Supreme Court of Florida being appealed from, and which reversed the judgment of the Circuit Court, was filed with the Clerk of the Supreme Court of the State of Florida on October 9, 1957. An order denying appellees' petition for rehearing was filed with the Clerk of the Supreme Court of Florida on April 2, 1958.
[fol. 79] This appeal is taken pursuant to Title 28 United States Code, Section 1257(2).

II. The Clerk will please prepare a transcript of record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The Amended Complaint, including Exhibit 2.
2. The City's defensive motions.
3. The Order of December 21, 1953.
4. The Petition for Certiorari to the Supreme Court.
5. The Order Denying Petition for Certiorari dated April 12, 1954.
6. The defendant's Answer.
7. The original exhibits comprising the Special Assessment Lien Records.
8. The final Decree.
9. The Order Amending Final Decree.
10. The Notice of Appeal.
11. The Assignments of Error.
12. Recite that on April 1, 1954, Norton R. Ganger and L. C. Bethart sued for themselves and all others similarly situated and filed their complaint which was substantially identical with the complaint filed in the case of Hamilton v. City of Miami, No. 159201. Also recite that the Ganger case was No. 167798-G, and that the City filed an Answer substantially identical with that filed in the Hamilton case.
13. The Final Decree in Chancery Cause No. 167798-G.
14. Notice of Appeal.

[fol. 80] 15. Assignments of Error.

16. The order of Consolidation dated April 22, 1955.
17. The Opinion of the Supreme Court dated January 30, 1957, including the special concurring opinion of Thornal, Jr., (sic) and dissenting opinion of Drew, J.
18. The Opinion in Case No. 28,058.
19. The Petition for Rehearing in Case No. 28,057.
20. The Petition for Rehearing in Case No. 28,058.

21. The Order granting Petition for Rehearing in both cases.

22. The Opinion in Case No. 28,057 on rehearing granted, including the dissenting opinion of Thomas, J.

23. The Opinion in Case No. 28,058.

24. The Motion for Leave to Supplement the Record, including all exhibits.

25. The petition for Rehearing.

26. The Amendment to Petition for Rehearing.

27. The application for leave to file brief.

28. The Order granting leave.

29. The order of April 2, 1958, denying Petition to supplement record.

30. The Order Granting Appellant's motion to Strike Appellees' Brief filed on constitutional questions.

31. The Order Denying Petition for Rehearing filed April 2, 1958.

Recite that the Order Denying Petition for Rehearing was concurred in by Terrell, C.J. and Drew, O'Connell and Thornal, J.J., and that it was dissented from by Justices Thomas, Roberts and Hobson.

[fol. 81] 32. The Order Staying Mandate.

33. The Notice of Appeal to the Supreme Court of the United States.

III. The following questions are presented by this appeal:

1. Is notice of hearing on special assessments as to resident owners whose interest, names and addresses were known by, in the possession of, and readily available to the City imposing the assessments, sufficient to comply with the requirements of the due process clause of Article XIV, Section 1, Amendments to the Constitution of the United States, where it affirmatively appeared that the

notice was published only two times in the classified section of a large metropolitan newspaper, that no other or further notice was given to or served on the abutting owners, and where the trial court affirmatively found that the alleged improvement conferred no benefit upon the abutting property?

2. Where a state statute requires abutting property owners of a particular municipality to file suit in the Circuit Court of Dade County within ten (10) days of confirmation of the special assessment roll, and the resident property owners had no notice of any of the proceedings other than by a notice of a hearing of objections to the roll published in the classified section of a local metropolitan newspaper, is such a limitation upon the right of abutting property owners to resort to the court violative of the due process and equal protection clauses of the Federal Constitution?

/s/ Thomas H. Anderson, Attorney for Appellants,
908 First National Bank Bldg., Miami 32, Florida.

[fol. 82] Certificate of service (omitted in printing).
[fol. 86] Clerk's Certificate to foregoing transcript (omitted in printing).

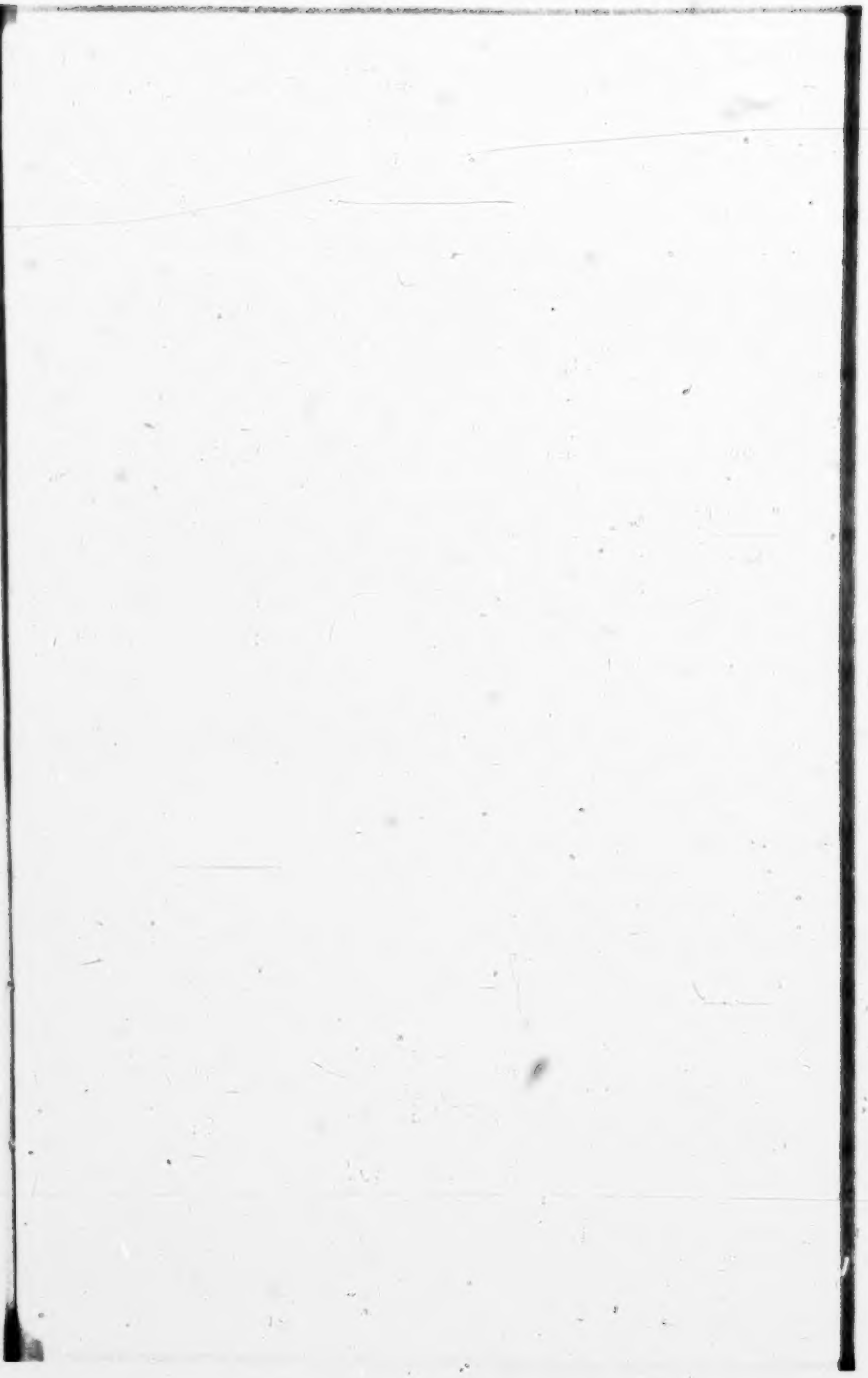
[fol. 87]

DEFENDANT'S UNNUMBERED EXHIBIT

[fol. 88]

(See Opposite)☞

FOLDOUTS TOO
BE FILMED



LARGE TO

[fol. 90]

PLAINTIFF'S EXHIBIT #10 FILED IN EVIDENCE
7/22/54

159201 and ——

RESOLUTION NUMBER 25006

HIGHWAY IMPROVEMENT DISTRICT H-503

A RESOLUTION ORDERING LOCAL IMPROVEMENT H-503

BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF MIAMI:

That a local improvement, described and designated as follows, shall be made under Section 56 of the City Charter:

Highway Improvement H-503 as follows:

ON:

South Miami Avenue, from S.W. 15th Street Road to 200' more or less south of Alatka Street.

This street shall be resurfaced from curb to curb with approximately ½" leveling course and 1" surface course of asphaltic concrete, including returns and intersections.

The property against which special assessments for the cost thereof shall be made is hereby designated District H-503.

PASSED AND ADOPTED this 19th day of November, 1952.

[fol. 91]

STATE OF FLORIDA
COUNTY OF DADE
CITY OF MIAMI

I, F. L. CORRELL, Clerk of the City of Miami, Florida, do hereby certify that the attached and foregoing contains a true and correct copy of a resolution passed and adopted by the Commission of the City of Miami, Florida, at a meeting held on the 19th day of November, 1952, and designated Resolution No. 25006.

WITNESS my hand and the official seal of the City of Miami, Florida, this 14th day of July, 1954.

F. L. CORRELL
CITY CLERK

By /s/ CHARLES H. SELLS
Charles H. Sells
Deputy City Clerk

(Seal)

[fol. 92]

NOTE RE EXHIBIT NO. 10

"The map of the streets of the City of Miami, which was a part of Exhibit 10, has been deleted from the printed record at the request of counsel for appellants."

[fol. 93]

CITY MANAGER'S ESTIMATE OF COST

OF

LOCAL IMPROVEMENT AND INCIDENTAL EXPENSE

HIGHWAY IMPROVEMENT DISTRICT H-503
ORDERED BY RESOLUTION NO. 25006
ADOPTED November 19, 1952

ESTIMATED COST OF IMPROVEMENT		$60,500.00
ESTIMATED INCIDENTAL EXPENSES:		
1. Surveys and Estimates	$1500.00	
2. Inspection, tests and supervision of construction	$2500.00	
3. Preparation of plans and specifications	$1000.00	
4. Printing and publishing notices and proceedings	$ 100.00	
5. Preparation of bonds	$	
6. Interest during construction	$	
7. Legal services, abstracts, etc.	$	

8. Other necessary and proper expenses	$ 900.00	
Total incidental expenses		$ 6000.00
TOTAL ESTIMATED COST AND INCIDENTAL EXPENSES		$66,500.00

DISTRIBUTION:

1. Estimated cost to be paid by City of Miami		$ 9,975.00
2. Estimated cost to be assessed abutting property		$56,525.00
3. Estimated cost of —— lin. ft. lateral		$
4. Number of feet of property abutting improvement		$17,024
5. Estimated assessment per front foot		$ 3.32
6. Estimated assessment per lin. ft. of lateral		$

WITNESS my signature at Miami, Florida, this 21st day of November, A.D. 1952.

(S) E. A. Evans
City Manager

Prep. by DWM 10/15/52
Ckd. by RNR 10/15/52

[fol. 94]
STATE OF FLORIDA
COUNTY OF DADE
CITY OF MIAMI

I, F. L. CORRELL, Clerk of the City of Miami, Florida, do hereby certify that the attached and foregoing contains a true and correct copy of City Manager's Estimate of Cost of Local Improvement and Incidental Expense regarding Highway Improvement District H-503.

Witness my hand and the official seal of the City of Miami, Florida, this 13th day of July, 1954.

F. L. Correll
City Clerk

By /s/ Charles H. Sells
Charles H. Sells
Deputy City Clerk

(Seal)

[fol. 95]

RESOLUTION NO. 25568

A Resolution Directing the Publication of Notices for Objections to Paving Improvements in the Area Designated as Highway Improvement District H-503

Whereas, the City Manager has reported that Asphalt Paving Company has completed paving improvements on South Miami Avenue, from S. W. 15th Street Road to 200' more or less south of Alatka Street, designated as Highway Improvement District H-503, in accordance with the City plans and specifications for said improvements, and

Whereas, the City Charter requires the publication of a notice for objections to persons interested in or affected by said improvements as to the acceptance thereof by the Commission.

Now, Therefore, Be It Resolved by the Commission of the City of Miami, Florida:

Section 1. That the City Clerk be, and he is hereby, authorized and directed to publish a notice in a newspaper published in the City of Miami, Florida, that at a meeting of the City Commission to be held on June 3, 1953, the City Commission will hear any objections of persons interested in or affected by the improvements as to the acceptance by the City Commission.

Passed and Adopted this 20th day of May, 1953.

[fol. 96]
STATE OF FLORIDA
COUNTY OF DADE
CITY OF MIAMI

I, F. L. CORRELL, Clerk of the City of Miami, Florida, do hereby certify that the attached and foregoing contains a true and correct copy of a resolution passed and adopted by the Commission of the City of Miami, Florida, at a meeting held on the 20th day of May, 1953, and designated Resolution No. 25568.

WITNESS my hand and the official seal of the City of Miami, Florida, this 14th day of July, 1954.

F. L. CORRELL
CITY CLERK

By /s/ CHARLES H. SELLS
Charles H. Sells
Deputy City Clerk

(Seal)

[fol. 97]

RESOLUTION NO. 25017

A RESOLUTION CONFIRMING THE ORDERING RESOLUTION FOR PAVING IMPROVEMENTS INCLUDED IN HIGHWAY IMPROVEMENT DISTRICT H-503

WHEREAS, at a meeting of the City Commission at 9:30 a. m., December 3rd, 1952, objections were heard to the confirmation of Resolution No. 25006, adopted November 19th, 1952, ordering local paving improvements in the area designated as Highway Improvement District H-503, and the plans, specifications and estimates of cost thereof, and no objections were filed;

NOW, THEREFORE, BE IT RESOLVED BY THE COMMISSION OF THE CITY OF MIAMI, FLORIDA:

Section 1. That Resolution No. 25006, adopted November 19th, 1952, ordering local paving improvements in the area

designated as Highway Improvement District H-503 be, and the same is hereby, confirmed.

PASSED AND ADOPTED this 3rd day of Dec., 1952.

[fol. 98]

STATE OF FLORIDA
COUNTY OF DADE
CITY OF MIAMI

I, F. L. CORRELL, Clerk of the City of Miami, Florida, do hereby certify that the attached and foregoing contains a true and correct copy of a resolution passed and adopted by the Commission of the City of Miami, Florida, at a meeting held on the 3rd day of December, 1952, and designated Resolution No. 25017.

WITNESS my hand and the official seal of the City of Miami, Florida, this 14th day of July, 1954.

F. L. CORRELL
CITY CLERK

By /s/ CHARLES H. SELLS
Charles H. Sells
Deputy City Clerk

(Seal)

[fol. 99]

THE MIAMI HERALD

PUBLISHED DAILY

MIAMI — DADE — FLORIDA

STATE OF FLORIDA
COUNTY OF DADE:

Before the undersigned authority personally appeared M. F. Self, who on oath says that he is Classified Advertising Manager of The Miami Herald, a daily newspaper published at Miami in Dade County, Florida; that the attached copy of advertisement, being a .....
in the matter of .....

in the ..... Court, was published in said newspaper in the issues of
November 22, 1952

Affiant further says that the said The Miami Herald is a newspaper published at Miami, in the said Dade County, Florida, and that the said newspaper has heretofore been continuously published in said Dade County, Florida, each day and has been entered as second class mail matter at the post office in Miami, in said Dade County, Florida, for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that he has neither paid nor promised any person, firm or corporation any discount, rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper.

/s/ M. F. Self

Sworn to and subscribed before me this 22nd day of November, A. D. 1952.

/s/ J. Fenwick Beossier
Notary Public, State of Florida at large.
My commission expires June 12, 1956.

My commission expires

(Seal)

Notice of Local Improvement
Highway Improvement District 503

All interested will take notice that at a meeting of the City Commission at 9:30 A. M. December 3rd, 1952, their objections will be heard to the confirmation of Resolution No. 25006, adopted November 19th, 1952, ordering paving improvements on South Miami Avenue, from S. W. 15th Street Road to 200′ more or less south of Alatka Street, designated improvement H-503.

Plans, specifications and estimate of cost of said improvement are on file in the City Clerk's office.

F. L. Correll
City Clerk

November 22, 1952.

[fol. 100]

THE MIAMI HERALD

PUBLISHED DAILY

MIAMI — DADE — FLORIDA

STATE OF FLORIDA
COUNTY OF DADE:

Before the undersigned authority personally appeared M. F. Self, who on oath says that he is Classified Advertising Manager of The Miami Herald, a daily newspaper published at Miami in Dade County, Florida; that the attached copy of advertisement, being a ..... in the matter of ..... in the ..... Court, was published in said newspaper in the issues of
May 23, 1953

Affiant further says that the said The Miami Herald is a newspaper published at Miami, in the said Dade County, Florida, and that the said newspaper has heretofore been continuously published in said Dade County, Florida, each day and has been entered as second class mail matter at the post office in Miami, in said Dade County, Florida, for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that he has neither paid nor promised any person, firm or corporation any discount, rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper.

/s/ M. F. SELF

Sworn to and subscribed before me this 23rd
day of May, A. D. 1953.

/s/ J. FENWICK BEOSSIER
Notary Public, State of Florida at large.
My commission expires June 12, 1956.

My commission expires

(Seal)

NOTICE TO PROPERTY OWNERS
Acceptance of Highway Improvement District H-503

All interested will take notice that paving work on South Miami Avenue, from S.W. 15th Street Road to 200′ more or less south of Alatka Street, designated Highway Improvement District H-503, has been completed and that at a meeting of the City Commission at 9:30 o'clock A.M. June 3rd., 1953, their objections will be heard to the acceptance thereof by the Commission.

F. L. CORRELL
City Clerk

5-23-53

[fol. 101]

RESOLUTION NO. 25598

A RESOLUTION INCREASING THE SCOPE OF THE ASPHALT PAVING COMPANY CONTRACT FOR RESURFACING WORK IN THE AREA DESIGNATED AS HIGHWAY IMPROVEMENT DISTRICT H-503, ACCEPTING THE COMPLETED WORK AND AUTHORIZING FINAL PAYMENT THEREFOR.

WHEREAS, a contract exists with Asphalt Paving Company for the resurfacing of South Miami Avenue, from S.W. 15th Street Road to 200′ more or less south of Alatka Street, designated as Highway Improvement District H-503, and

WHEREAS, due to an overrun of certain quantities and the removal of curb and gutter and rock pavement, it will be necessary to increase the scope of the Asphalt Paving Company contract in the amount of $2,834.58, and

WHEREAS, the Commission met on June 3rd, 1953, after due legal notice, for the purpose of hearing any objections to the acceptance of paving improvements performed by Asphalt Paving Company, pursuant to their contract dated March 13, 1953, including resurfacing of South Miami Avenue from S. W. 15th Street Road to 200′ more or less south of Alatka Street, designated as Highway Improvement District H-503, and no objections having been filed, and

WHEREAS, it is shown by the report of the City Manager, which has been filed for identification, that the improvements in the District aforesaid have been properly and completly done at a total cost of $48,605.08, and are in conformity to the plans, specifications, profiles, details and drawings of the City Manager, as adopted by the Commission of the City of Miami, Florida for such improvements, and being satisfied that said work has been done and completed in accordance therewith;

NOW, THEREFORE, BE IT RESOLVED BY THE COMMISSION OF THE CITY OF MIAMI, FLORIDA:

Section 1. That the scope of the Asphalt Paving Com-
[fol. 102] pany contract, dated March 13, 1953, for resurfacing the aforementioned street, designated as Highway Improvement District H-503 be, and the same is hereby, increased to include the sum of $2,834.58.

Section 2. That the construction of paving improvements, as set forth above, be, and the same are hereby, accepted at a total cost of $48,605.08.

Section 3. That the proper officials of the City of Miami, Florida be, and they are hereby, authorized and directed to pay Asphalt Paving Company the sum of $12,354.84 as full and final payment for work performed and materials furnished in connection with the aforementioned contract.

PASSED AND ADOPTED this 3 day of June, 1953.

[fol. 103]
STATE OF FLORIDA
COUNTY OF DADE
CITY OF MIAMI

I, F. L. CORRELL, Clerk of the City of Miami, Florida do hereby certify that the attached and foregoing pages numbered 1 through 2, inclusive, contain a true and correct copy of a resolution passed and adopted by the Commission of said City at a meeting held on the 3rd day of June, 1953 designated Resolution No. 25598.

WITNESS, my hand and the official Seal of The City of Miami, Florida this 15 day of July, 1954.

F. L. CORRELL
City Clerk

By /s/ RAYMOND I. MOORE
Deputy City Clerk

(Seal)

[fol. 104]

RESOLUTION NO. 26250

A RESOLUTION CONFIRMING THE PRELIMINARY ASSESSMENT ROLL FOR CONSTRUCTION OF CERTAIN PAVING IMPROVEMENTS IN A PORTION OF HIGHWAY IMPROVEMENT DISTRICT H-503

WHEREAS, the Commission of the City of Miami, Florida met on the 3rd day of February, 1954, pursuant to due legal notice of said meeting under Section 56, City Charter to hear all written objections to the confirmation of the preliminary assessment roll for the cost of paving improvements, as follows:

> South Miami Avenue from S.W. 15th Road to 320 feet, more or less South of Alatka Street

in a portion of Highway Improvement District H-503, and

WHEREAS, no objections thereto were made by any person interested in, or affected by said assessment roll and the said assessment roll appearing, in all respects, regular and in accordance with the requirements and provisions of the City Charter;

NOW, THEREFORE, BE IT RESOLVED BY THE COMMISSION OF THE CITY OF MIAMI, FLORIDA:

Section 1. That the prima facia (sic) assessments, as apportioned and indicated on said preliminary assessment roll be, and they are hereby, in all things, confirmed and sustained against any and all lots or parcels of ground described therein.

Section 2. That the sums and amounts assessed against each of the lots or parcels of ground in said preliminary

rolls are less than the amount that each of the said lots or parcels of ground is especially benefited by said improvement and that such amounts are in proportion to the special benefits that the property received and that the proportion of said costs to be paid by the City of Miami are the sums set forth opposite the same therein.

Section 3. That the total cost of the said paving improvements in the sum of $41,395.48 be, and the same is hereby, approved and confirmed.

Passed and Adopted this 18 day of Feb. 1954.

[fol. 105]

State of Florida
County of Dade
City of Miami

I, F. L. Correll, Clerk of the City of Miami, Florida, do hereby certify that the attached and foregoing contains a true and correct copy of a resolution passed and adopted by the Commission of the City of Miami, Florida, at a meeting held on the 18th day of February, 1954, and designated Resolution No. 26250.

Witness my hand and the official seal of the City of Miami, Florida, this 14th day of July, 1954.

F. L. Correll
City Clerk

By /s/ Charles H. Sells
Charles H. Sells
Deputy City Clerk

(Seal)

[fol. 106]

THE MIAMI HERALD

Published Daily

Miami — Dade — Florida

State of Florida
County of Dade:

Before the undersigned authority personally appeared M. F. Self, who on oath says that he is Classified Adver-

tising Manager of The Miami Herald, a daily newspaper published at Miami in Dade County, Florida; that the attached copy of advertisement, being a .....
in the matter of .....
in the ..... Court, was published in said newspaper in the issues of
January 19, 26, 1954

Affiant further says that the said The Miami Herald is a newspaper published at Miami, in the said Dade County, Florida, and that the said newspaper has heretofore been continuously published in said Dade County, Florida, each day and has been entered as second class mail matter at the post office in Miami, in said Dade County, Florida, for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that he has neither paid nor promised any person, firm or corporation any discount, rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper.

/s/ M. F. Self

Sworn to and subscribed before me this 28th day of January, A. D. 1954.

/s/ J. Fenwick Beossier
Notary Public, State of Florida at large.
My commission expires June 12, 1956.

My commission expires

(Seal)

Notice to Property Owners
Preliminary Assessment Roll—
District H-503

All interested will take notice that at a meeting of the City Commission at 9:30 o'clock AM February 3rd, 1954, their objections will be heard to the confirmation of the Preliminary Assessment Roll for the cost of paving improvements on South Miami Avenue, from SW 15th Road to 320 feet more or less South of Alatka Street, in District H-503.

Said Preliminary Assessment Roll is now open to public inspection in the City Clerk's Office.

F. L. Correll
City Clerk

Jan 19, 26: 1954

[fol. 107]

Excerpts of
Minutes of the Regular Meeting of the Commission of the City of Miami, Florida

---

On the 19th day of November, 1952, the Commission of the City of Miami, Florida, met at the City Hall in said City in regular session. The meeting was called to order at 9:31 o'clock A.M. by Chairman Chelsie J. Senerchia, and on roll call the following members of the Commission were found to be present: Messrs. Palmer, Quigg, Wolfarth and Senerchia. Absent: Mr. Givens.

* * * * * * *

Recess:

The meeting was recessed at 12:45 o'clock P.M. to 1:30 o'clock P.M. this date.

The Commission reconvened at 1:30 o'clock P.M. with the following members present: Messrs. Palmer, Quigg, Wolfarth and Senerchia. Absent: Mr. Givens.

* * * * * * *

Ordering H-503

The following resolution was introduced by Mr. Wolfarth, who moved its adoption:

RESOLUTION NUMBER 25006

Highway Improvement District H-503

A Resolution Ordering Local Improvement H-503
Be It Resolved by the City Commission of the City of Miami:

That a local improvement, described and designated as follows, shall be made under Section 56 of the City Charter:

Highway Improvement H-503 as follows:

On:

South Miami Avenue, from S.W. 15th Street Road to 200′ more or less south of Alatka Street.

This street shall be resurfaced from curb to curb with approximately ½″ leveling course and 1″ surface course of Asphaltic concrete, including returns and intersections.

The property against which special assessments for the cost thereof shall be made is hereby designated District H-503. Upon being seconded by Mr. Quigg the resolution was passed and adopted by the following vote—Ayes: Messrs. Palmer, Quigg, Wolfarth and Senerchia. Noes: None.

* * * * * * *

[fol. 108] Adjournment: There being no further business to come before the Commission at this time, on motion duly made and seconded, the meeting was adjourned at 5:21 o'clock P.M.

(S) Chelsie J. Senerchia
Mayor

Attest: (S) F. L. Correll
City Clerk

[fol. 109]
State of Florida
County of Dade
City of Miami

I, F. L. Correll, Clerk of the City of Miami, Florida, do hereby certify that the attached and foregoing pages numbered 1 and 2, inclusive, contain a true and correct copy of Excerpts of Minutes of the Regular Meeting of the City Commission, held on the 19th day of November, 1952, regarding Resolution No. 25006.

Witness my hand and the official seal of the City of Miami, Florida, this 13th day of July, 1954.

F. L. Correll
City Clerk

By /s/ Charles H. Sells
Charles H. Sells
Deputy City Clerk

(Seal)

[fol. 110]

EXCERPT OF
MINUTES OF THE REGULAR MEETING OF THE COMMISSION
OF THE CITY OF MIAMI, FLORIDA

On the 3rd day of February, 1954, the Commission of the City of Miami, Florida met at the City Hall in said City in regular session. The meeting was called to order at 9:35 o'clock A.M. by Chairman Abe Aronovitz, and on roll call the following members of the Commission were found to be present: Messrs. Christmas, Hearn, Quigg and Aronovitz. Absent: Mr. Senerchia.

* * * * * * *

NOTE: Mr. Senerchia entered the meeting at 9:37 o'clock A.M.

* * * * * * *

OBJECTIONS TO CONFIRMATION OF PRELIMINARY ASSESSMENT ROLL—H-503:

The Mayor announced that, pursuant to legal notice, the Commission was ready to hear any objections to the confirmation of the Preliminary Assessment roll for the cost of highway improvements on South Miami Avenue from SW 15th Road to 320 feet more or less South of Alatka Street, in district H-503.

There were no objections filed with the Commission.

* * * * * * *

ADJOURNMENT:

There being no further business to come before the Commission at this time, on motion duly made and seconded, the meeting was adjourned at 5:35 P.M.

(S) ABE ARONOVITZ
Mayor

ATTEST: (S) F. L. CORRELL
City Clerk

[fol. 111]
STATE OF FLORIDA
COUNTY OF DADE
CITY OF MIAMI

I, F. L. CORRELL, Clerk of the City of Miami, Florida, do hereby certify that the attached and foregoing contains a true and correct Excerpt of the Minutes of the Meeting of the Commission of the City of Miami, Florida, held on the 3rd day of February, 1954, in connection with a public hearing for the purpose of considering any objections to the confirmation of the preliminary assessment roll for the Cost of Paving Improvements in Highway Improvement District H-503.

WITNESS my hand and the official seal of the City of Miami, Florida, this 16th day of July, 1954.

F. L. CORRELL
City Clerk

By /s/ H. D. SOUTHERN
H. D. Southern
Deputy City Clerk

(Seal)

[fol. 115]

SUPREME COURT OF THE UNITED STATES

No. 153—October Term, 1958

NORTON R. GANGER, L. C. BETHART, THOMAS B. HAMILTON, et al., Appellants,

vs.

CITY OF MIAMI, a Municipal Corporation in Dade County, Existing Under the Law of the State of Florida.

Appeal from the Supreme Court of the State of Florida.

ORDER POSTPONING JURISDICTION—October 13, 1958

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. Counsel are directed to discuss the question of whether the constitutional issues were raised and decided below.

[redacted]

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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. .....

NORTON R. GANGER and L. C. BETHART ET AL.,
Appellants,

vs.

CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Law of the State of Florida,
Appellees.

THOMAS B. HAMILTON and JANE Q. HAMILTON, His Wife, and HUNTER LYONS, INC.,
a Florida Corporation,
Appellants,

vs.

CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Law of the State of Florida,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 15 of the Revised Rules of the Supreme Court of the United States, appellant submits herewith its statement as to the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Florida entered in these causes.

OPINIONS BELOW.

The opinions of the Supreme Court in this cause are reported in 101 So. 2d 116 and 123.* Copies of these opinions are attached hereto as Appendix "A".

JURISDICTION.

Appellants' suit sought to have certain assessments levied pursuant to sections of the statutory charter of the City of Miami declared unconstitutional and void. The suits were originally commenced in the Circuit Court of the Eleventh Judicial Circuit of Dade County, in which County the properties lie and the City of Miami is situated. The decision of the Circuit Court held the assessments to be void on constitutional grounds. The decision of the Supreme Court of Florida first affirmed the decree of the Circuit Court. On re-hearing granted a majority of the Supreme Court of Florida (three Judges dissenting) reversed the decree. A petition for rehearing timely filed by the appellants herein was denied on April 2, 1958. A notice of appeal to the Supreme Court of the United States was presented to the Supreme Court of Florida on June 2, 1958.

The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Mullane v. *Central Hanover Bank & Trust Company*, 339 U.S. 306.

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*This volume does not contain the original opinion. See R. 32.

New York v. *New York, N. H. & H. R. Co.*, 344 U.S. 293.
Covey v. *Town of Somers*, 351 U.S. 141.
Wisconsin Electric Power Company v. *City of Milwaukee*, 352 U.S. 948.

STATUTES INVOLVED.

City of Miami Charter, Section 56 (a) (Class 1) (E) (F) (L) (M) (N) (O), Chapter 10847, *Laws of Florida 1925 as amended.* These charter provisions are set forth in Appendix "B" attached hereto.

QUESTIONS PRESENTED.

1. Is notice of hearing on special assessments as to resident owners whose interest, names and addresses were known by, in the possession of, and readily available to the City imposing the assessments, sufficient to comply with the requirements of the due process clause of Article XIV, Section 1, Amendments to the Constitution of the United States, where it affirmatively appeared that the notice was published only two times in the classified section of a large metropolitan newspaper, that no other or further notice was given to or served on the abutting owners, and where the trial court affirmatively found that the alleged improvement conferred no benefit upon the abutting property?

2. Where a state statute requires abutting property owners of a particular municipality to file suit in the Circuit Court of Dade County within ten (10) days of confirmation of the special assessment roll, and the resident property owners had no notice of any of the proceedings other than by notice of a hearing of objections to the roll

published in the classified section of a local metropolitan newspaper, is such a limitation upon the right of abutting property owners to resort to the court violative of the due process and equal protection clauses of the Federal Constitution?

STATEMENT.

Pursuant to the provisions of an Act of the Florida Legislature (Ch. 10847, Laws 1925) incorporating the City of Miami, the city commission decided to resurface certain arterial highways serving the business district in the city. The Charter Act which authorized the doing of such work provided for the laying of special assessments against the property found to have been specially benefited. This legislative enactment provided for two notices to be given to affected property owners—one upon the initiating of the proceedings and the other upon the conclusion. Both notices were *required* to be published in a daily newspaper of general circulation published in the City. No other provision for notice was contained in the Act.

The first notice was required to be published *one time* and to state that at a meeting of the Commission held on a certain day and hour, it would hear the objections of all interested persons to the confirmation of the resolution which ordered the improvements to be made.

The second notice was required to be published *two times* and to state that at a regular meeting of the Commission held on a certain day and hour, all interested might appear and file written objections to the confirmation of the special assessment roll which fixed the amount of the liens which the Commission had imposed on each abutting property as its share of the cost of the improvement.

In one of the cases at bar (*Hamilton* v. *City of Miami*) the cost assessed against the abutting property was $173,148.00. In the Ganger case, the cost so assessed was $56,525.00.

The Charter Act further provided that upon the confirmation of the roll it would be final and conclusive, unless, within ten (10) days from such confirmation, an affected owner filed a verified petition in the Circuit Court of Dade County, setting forth that the assessment was invalid. In addition he was required to file with the Clerk a written undertaking in the sum of $200.00 with sufficient surety conditioned to pay all costs and damages sustained by the City by reason of the proceedings.

Upon service of the petition on the City Manager within ten (10) days and the filing of his answer, the cause was required to be heard "upon such evidence as may be presented to the Court."

On hearing the Court was authorized to set aside the assessment in whole or in part.

On March 1, 1950, the Miami City Commission adopted a resolution ordering a local improvement to be made in certain downtown streets by *resurfacing* the existing asphalt concrete pavement with a specified leveler course and wearing surface. Pursuant to the Charter, a notice of local improvement was published one time in the classified advertising section of the Miami Herald.* The body of the notice was as follows:

"All interested will take notice that at a meeting of the City Commission at 9:30 o'clock AM March 15,

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*This paper is said to carry more advertising in its classified section than any other newspaper in the United States.

1950, their objections will be heard to the confirmation of Resolution No. 22277, adopted March 1st, 1950, ordering paving improvements on the following avenues, to-wit:

* * *

"Plans, specifications and estimate of cost of said improvement are on file in the City Clerk's Office.

F. L. Correll,
City Clerk."

It will be noted at once that the notice contains several glaring defects: It is indefinite as to the place where the objections would be heard, is addressed to no one in particular and does not designate the municipality which is involved in the work and gives no information as to the fact that special assessments were to be levied to pay for the improvement.

Subsequently a resolution was adopted confirming the initiating resolution and ordering the work to be done which was duly accomplished.

At the time of the adoption of Resolution 22277, and at the present time, the streets described in Highway Improvement District H-477 were main thoroughfares of the City of Miami. These streets had originally been paved, at the expense of the abutting property owners, and the paving had been laid with a sufficiently suitable and durable surface to enable all abutting property owners to obtain ingress and egress to and from their several properties and to afford reasonable use by the general public. The streets in said highway improvement district were not reasonably in need of being resurfaced, and it was not necessary to do the work thereon which the City subsequently performed and for which it thereafter imposed special assessment liens on the abutting properties (R. 4).

When the work was completed in February, 1953, the City took steps to impose the cost thereof on the abutting owners and in order to comply with the Charter caused a notice to be published two times in the Miami Daily News in the issues of February 20 and 27, 1953, the body of which reads as follows:

> "All interested will take notice that at a meeting of the City Commission at 9:30 o'clock AM March 15, 1950, their objections will be heard to the confirmation of Resolution No. 22277, adopted March 1st, 1950, ordering paving improvements on the following avenues, to-wit:
>
> (Describing property.)
>
> in District H-477.
>
> Said Preliminary Assessment Roll is now open to public inspection in the City Clerk's Office.
>
> F. L. Correll,
> City Clerk."

There being no objection made, the Commission resolved that the Assessment Roll be confirmed and that the abutting property received benefits in proportion to the cost. Appellants did not become aware of the assessment until the time for appeal had expired.

Within a few weeks thereafter (May 4, 1955) Hamilton and others suing on behalf of themselves and all others similarly situated* brought a suit in the Circuit Court of Dade County to enjoin the enforcement of the liens and to cancel the assessments (R. 1).

The Complaint charged that the assessments were void because no benefit was derived from the improvement and

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*Such practice has been expressly approved by the Supreme Court of Florida. *Tenney et al.* v. *City of Miami Beach*, Fla., 11 So. 2d 188.

because the notice was insufficient.

The Complaint expressly charged that the liens sought to be imposed were void in that they constituted a taking in violation of the Constitution of the United States.

The Circuit Court of the Dade County is a court of general jurisdiction (*Fla. Const.*, Art. V, Sec. 11). It has constitutional and statutory power over cases involving the legality of any tax, assessment or toll. *Fla. Sts.* 196.01. There is no specific statute of limitations governing the bringing of such a suit. Actions for the recovery of money may only be commenced within three years from the accrual of the causes of action, *Fla. Sts.* 95.11, and actions against a municipality to recover damages for negligent injury to persons or damage to property must be brought within twelve months from the time of the injury or damage. *Fla. Sts.* 95.24.

The Circuit Court held the complaint, as amended to be sufficient and denied the City's motion to dismiss. The Supreme Court of Florida affirmed this order (*City of Miami* v. *Hamilton*, Fla., 73 So. 2d 715).

The City answered the complaint, as amended, alleging that the plaintiffs were estopped to attack the assessments and that the confirming resolution was conclusive on the parties.

On a trial before the Court (Wiseheart, J.) it was found that:

> "5. The notice of hearing of objections to the imposition of the assessment hereinabove referred to was insufficient as a matter of law in that it specified no place where the objections would be heard, and there was no designation in the notice of what city commission was to hear objections, no designation of the City

in which the streets were located, or of what city the person filing the notice was clerk. The notice was also insufficient because it was inserted in the classified section of the Miami Herald and in such a manner that it cannot be said that any reasonable person was put upon notice by it that their property was going to be subjected to a special assessment.

"6. The streets which comprise Highway improvement District No. H-477 are thoroughfares and arterial highways, with but one exception, in the City of Miami, and the resurfacing was necessary to keep the streets in repair to facilitate the flow of traffic on such streets in and out of the downtown Miami area.

"7. No special benefit was conferred upon the abutting property by the resurfacing of said streets, and the benefit which was derived therefrom was general and not special." (R. 20).

It was accordingly decreed that the action of the City in assessing the cost of the improvements against the abutting owner was unreasonable and null and void.

From this decree the City appealed.

Shortly after the institution of the Hamilton suit, certain property owners, including one Ganger brought a similar suit attacking similar assessments in another district. This suit was consolidated with Hamilton's suit for the purpose of trial and a like decree was rendered (R. 26). The City also appealed Ganger's suit.

The Supreme Court of Florida affirmed both decrees, but the opinion was delivered in Ganger's suit and a simple memorandum opinion was filed in Hamilton's suit (R. 32. 43).

The majority opinion (per Thomas, J.) held that the notice was sufficient, but that the City lacked statutory power to resurface the streets at the cost of the abutting

owners. Justice Thornal concurred specially, saying (R. 38):

> "I concur in the judgment of affirmance. I agree with all of the opinion of Mr. Justice Thomas save that portion which in effect holds that the City Charter did not authorize the levy of an assessment for special benefits to particular property which might result from the 're-surfacing' of a street. In my view, authority to assess the cost of 're-macadamizing' a street is tantamount to authority to assess for 're-surfacing' a street. However, in order to justify the assessment the improvement must redound to the special benefit of the property that is being assessed. Utley v. City of St. Petersburg, 107 Fla. 6, 144 So. 58; Fisher v. Board of County Commissioners of Dade County, (Fla. 1956), 84 So. 2d 572.
>
> "Here the trial judge specifically found that 'the work was for the benefit of the general public, and the abutting owners received no special benefit'. The record abounds in evidence more than adequate to sustain this conclusion.
>
> "For the foregoing reasons and the reasons announced by Mr. Justice Thomas on the other points, I would affirm this decree."

Drew, O'Connell and Hobson, JJ., dissented.

On the City's petition for re-hearing, Thornal, J., in spite of what he had said, joined the minority and voted to reverse the decree. Thomas, Terrell and Roberts, JJ., dissented.

The property owners petitioned for re-hearing on the following grounds among others (R. 66):

> "4. In holding the notice of the confirmation of the assessment roll sufficient, and that the appellees were estopped to challenge the lack of benefits because they failed to object pursuant to the notice, the Court

overlooked, or failed to consider that the procedure for the imposition of assessment liens is quasi judicial and that the requirements of procedural due process guaranteed by Amd. XIV, U.S. Const., must be complied with. In the case of residents, constructive notice, as attempted, is violative of the rights secured by such amendment."

Walker v. *City of Hutchinson*, 352 U.S. 112.
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306.

"5. The Court, in holding the notice good, overlooked or failed to consider that the notice directed to all interested persons did not contain any notice or warning (even by inference) that a special assessment was going to be levied.

* * *

"8. In holding the notice sufficient, the Court overlooked or failed to consider the fact that the City Charter and requirements of due process required that the notice state the time and place where the objectors will be heard. This the notice wholly failed to do.

"9. The Court overlooked or failed to consider that the Chancellor made a finding after a full hearing that the assessed property owners received no benefit. Such a finding renders the assessment void, discriminatory and unconstitutional under the equal protection and due process clauses of the Federal Constitution.

"10. The Court overlooked or failed to consider that a special assessment is void unless founded upon special benefit to the abutting owners."

Village of Norwood v. *Baker*, 172 U.S. 269.

While the proceedings were pending in the Supreme Court of Florida, the objecting taxpayers learned that the City had created at least two new highway improvement districts, in which public improvements were to be made.

The work done in those districts is almost identical with that done in the districts involved in the present litigation. Based upon this discovery the property owners took the deposition of the Finance Director of the City of Miami and procured from him the admission that the work in the new districts was to be paid for from the proceeds of bonds issued by the City to the payment of which there was pledged the moneys derived from a franchise given to the Florida Power & Light Company, the local public utility.

Municipal action with respect to the assessments was evidenced by a Resolution (R. 64) which provided for the making of a local improvement in a specified district and which contained a recital by one of the Commissioners that the Commission "had agreed not to assess property owners for a proportionate share of the costs of any resurfacing of streets." Accordingly he "requested that any reference to assessments for the costs of this improvement be stricken from the Resolution, which was agreed to prior to roll call on the Resolution."

The property owners also proved by a memorandum from the City Finance Director to the Department of Engineering that the resurfacing work in these districts was not to be assessed against the abutting owners, but that the method of removing the liens was not to be agreed upon at that time, because pending law suits (evidently meaning the ones in this case) made such action inadvisable. The memorandum directly referred to "litigation of other districts of a similar nature". It concluded by stating that as soon as a clearance was received from the Law Department, arrangements would be made to have the liens removed by commission action (R. 62).

Upon the determination of this matter, the property owners then sought to bring these proceedings to the at-

tention of the Supreme Court by filing a petition for leave to supplement the record (61).

This petition was denied, but in the petition for rehearing heretofore referred to, a reconsideration of the cause was sought upon the grounds that the Court overlooked or failed to consider this petition, which showed that since the work complained of in the case at bar was completed, the City had on other occasions done similar work in similar districts for which it made no charge to the abutting owners. It was expressly contended that this action, done under a City ordinance, constituted class legislation and denied to the property owners here the equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States.

The Court then granted the property owners (appellants herein) leave to file a brief directed to the Federal Constitutional Questions presented by the petition for rehearing but later, the Court, without assigning any reason for such action, struck the brief.

On the same day on which the brief was struck, April 2, 1958, the Court denied the property owners' petition for re-hearing. This appeal is taken from the opinion on rehearing which did not become final until April 2, 1958.

THE QUESTION IS SUBSTANTIAL.

The question involved on this appeal is similar to that raised in *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, and *New York* v. *New York, N. H. & H. R. Co.*, 344 U.S. 293, relating to the insufficiency of notice by publication and is of importance to all property owners. In those cases the Court held that notice by publication can now only be justified where necessary. In

Mullane v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, the late Mr. Justice Jackson stated this for the Court as follows (p. 318):

> "* * * Where the name and post-office addresses of those affected by a proceeding are at hand, *the reasons disappear* for resort to means less likely than the the mails to apprise them of its pendency." (Emphasis supplied).

In *New York* v. *New York, N. H. & H. R. Co.*, 344 U.S. 293, the Court in a unanimous decision said (pp. 296, 297):

> "Section 77 (c) (8) of the Act states that 'The **Judge shall cause reasonable** notice of the period in which claims may be filed, * * * by publication or otherwise'. 11 U.S.C., Sec. 205 (c) (8). We hold that publication of the bar order in newspapers cannot be considered 'reasonable notice' to New York under the circumstances of this case.
>
> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652. But when the names, interests and addresses of person are unknown, plain necessity may cause a resort to publication. See, e. g. Standard Oil Co. v. New Jersey, 341 U.S. 428, 95 L. Ed. 1078, 71 S. Ct. 822. The case here is different. No such excuse existed to justify subjecting New York's claims to the hazard of forfeiture arising from the 'constructive notice' by newpaper. * * *
>
> "The statutory command for notice embodies a basic principle of justice * * * that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York City has not been accorded that kind of notice."

In the New York case the City imposed liens on specific parcels of the railroad's real estate for street, sewer and other improvements. Reorganization of the railroad was begun in the Federal District Court. That court issued an order directing creditors to file their claims by a prescribed date. Copies of that order were mailed to creditors who had appeared in court. Other creditors had to depend for their notice on two once-a-week publications of the order in five daily newspapers, one of which was the Wall Street Journal. New York City received no copy of the order and never filed its lien claims. The railroad then sued to have the city's lien claims declared unenforceable. The District Court and Court of Appeals held for the railroad. However on appeal to the Supreme Court of the United States that holding was reversed.

More recently this court noted probable jurisdiction of a case involving the identical question here presented (*Wisconsin Electric Power Company* v. *City of Milwaukee*, 352 U.S. 948). In this case the Wisconsin Electric Power Company brought suit in the circuit court for Milwaukee County attacking special assessments imposed upon property of the plaintiff by the City, on the ground that the property owner did not have sufficient notice of imposition of the assessments. The Circuit Court dismissed the suit and the Power Company appealed. The decree was affirmed by a divided court. Upon remand the plaintiff obtained leave to file an amended pleading which was done and the cause was again dismissed. The Power Company again appealed and on the second appeal the appellant relied upon *New York* v. *New York, N. H. & H. R. Co., supra,* and *Mullane* v. *Central Hanover Bank & Trust Co., supra.* The Court again affirmed the decree and the Power Company appealed. This court noted probable jurisdiction (352 U.S. 949) and remanded the case to the Supreme Court of

Wisconsin for further consideration of the Federal question. On reconsideration the Supreme Court of Wisconsin said, 274 Wis. 121, 81 N.W. 2d 298:

> "In view of the determination made by the United States Supreme Court we hold that the constructive notice given by the defendant city by publication of the proposed special assessments against the plaintiff's lands did not meet the requirements of due process. Mullane v. Central Hanover B. & T. Co., 1950, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865, and Walker v. City of Hutchinson, 1956, 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178. Therefore, it was error for the trial court to have sustained the general demurrer interposed to plaintiff's amended complaint."

No necessity exists which justifies notice by publication in the instant case. The City had the names and addresses of the property owners and actually mailed bills to them for the special assessment lien after the roll had been confirmed.

Necessity is not proven by the fact that the legislature has sanctioned notice by publication of special assessments. The same argument was rejected by this Court in *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306. It is for the courts to determine whether an act is constitutional and not for the legislature.

Such indeed has been the holding of the Supreme Court of Florida. In *Rafkin* v. *City of Miami Beach*, Fla., 38 So. 2d 836, an attack was made upon special assessments proceedings conducted by the City of Miami Beach under a charter which is almost identical with that of the City of Miami. It was contended among other things that the notice of special assessment proceedings was insufficient because it was published in the classified advertising section of the Miami Herald, the same paper publication in which is in-

volved in the instant suit. In discussing this point the court said:

> "* * * The notice in question did not meet the requirements contemplated by law, * * * it is so intermingled with other printed matter that one of ordinary mind would not be put on notice that his rights were in danger."

This opinion was written for the Court by Justice Terrell, now the Chief Justice, who originally concurred in the Court's opinion affirming the decree of the Circuit Court in this case and who subsequently voted in favor of denying the City's petition for re-hearing, which was subsequently granted, and upon which action the decree of the Circuit Court was reversed. When the Appellants herein moved for a re-hearing on the ground that the action of the City violated the property owners' constitutional rights, Chief Justice Terrell voted against granting this petition for re-hearing. However, Justice Hobson who had previously voted to reverse the decree of the Circuit Court of Dade County, changed his position and voted to grant the property owners' petition for re-hearing based on Federal Constitutional grounds, but the defection of the Chief Justice left the property owners with a minority on the Supreme Court of Florida.

The situation with respect to that Court is rendered the more puzzling in view of the fact that Justice Thornal originally wrote a specially concurring opinion in which he held that no benefit was conferred upon the abutting property by the re-surfacing work. Justice Thornal subsequently, on the City's petition for re-hearing, voted to reverse the decree but did not state his reasons.*

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*In any case five of the seven Justices of the Florida Supreme Court have at one time or another agreed with the property owners' contention.

The late Mr. Justice Jackson in *Mullane* v. *Central Hanover Bank & Trust Company, supra,* in speaking for the Court said:

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare Hess v. Pawloski, 274 U.S. 352; 71 L. Ed. 1091, 47 S. Ct. 632, with Wuchter v. Pizzutti, 276 U.S. 13, 72 L. Ed. 446, 48 S. Ct. 259, 57 A.L.R. 1230, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.
>
> "It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted on the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.
>
> * * *

> "We hold that the notice of judicial settlement of accounts required by the New York Banking Law, § 100-c (12), is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion."

The holding is particularly important when it is considered that special assessment proceedings in order to be constitutional must rest upon benefits actually conferred upon the property.

> *McQuillin Municipal Corporations, Third Edition*, Sec. 38.02.
>
> *Illinois Central Railroad Company* v. *City of Decatur*, 147 U.S. 190.

In *Georgia Railway & Electric Company* v. *City of Decatur*, 295 U.S. 165, the Court said:

> "Under the statute and ordinance thus construed, if the burden imposed is without any compensating advantage (as appellants offered to show), the arbitrary abuse of the power exercised is plain, Myles Salt Co. v. Iberia & St. M. Drainage Dist., 239 U.S. 478, 485, 60 L. Ed. 392, 396, 36 S. Ct. 204, L.R.A. 1918E, 190; the assessment amounts to confiscation, Bush v. Branson, (C.C.A. 8) 248 Fed. 377, 380, 381. And this doctrine has been fully recognized in Georgia. Savannah v. Knight, 172 Ga. 371, 375, 157 S.E. 309, 73 A.L.R. 1289."

In such a situation scrutiny should be directed to proceedings where as here, the period of time within which the property owner has to protect his rights is so very short. In such a case not only should the notice be delivered personally, but it should be sufficiently full and complete to inform the property owner that his rights are to be affected. In the case at bar the notice simply states that at a meeting

of the City Commission at 9:30 o'clock A.M., on March 4, 1953, their objections are to be heard, etc. No city was identified, no place specified, no tribunal otherwise designated although there are twenty-six municipalities in Dade County. The notice was simply signed by F. L. Correll, City Clerk.

That notice is necessary, is beyond question.

Turpin v. *Lemon*, 187 U.S. 51.
Londoner v. *City and County of Denver*, 210 U.S. 373.

In *Billingham Bay & B. C. R. Co.* v. *City of New Whatcom*, 172 U.S. 314, involving special assessments, the Court said:

> "* * * And the time and place must be such that with reasonable effort he will be enabled to attend and present his objections."

From *City of Norfolk* v. *Young*, 97 Va. 728, 34 S.E. 886, we quote:

> "The notice * * * wholly failed to designate * * * a place where * * * the party to be affected had the right to appear to expose any alleged wrong in the assessment imposed upon him or his property."

and in *City of Logansport* v. *Polland*, 50 Ind. 151, it is said:

> "* * * the notice given * * * did not specify the place of the meeting of the commissioners and it was, therefore, in our opinion, insufficient. * * * These objections are fatal."

Even if the notice had been sufficient as to form and had been personally served on each complaining property owner, the assessment would still have been void under Federal Constitutional guaranties because a resulting benefit did not flow to the affected properties.

Village of Norwood v. *Baker*, 172 U.S. 269.

In *Milwaukee Electric Ry. & Light Co.* v. *Village of Shorewood*, (Wis.) 193 N.W. 94, the Court held (Headnote 5, 6):

> "An action to avoid a special assessment made under St. 1915, § 905, not brought within the time prescribed by section 924-197, *held* nevertheless maintainable, since the assessment was invalid because not based on benefits.
>
> "The one-year limitation contained in St. 1917, § 121-h, against the bringing of actions to avoid special assessments or taxes, is no bar to an action to set aside an assessment by a village board under section 905, which is void, because not based on benefits."

The trial court found that there had been no resulting benefits to the abutting property in the cases at bar. This finding was not seriously challenged by the City on appeal. Nevertheless, Thornal, J., specially concurring, found that "the record abounds in evidence *more than adequate* to sustain this conclusion". (Emphasis supplied).

The majority opinion below sustained the assessment on the ground that a failure to object *and* resort to the statutory review proceedings worked an estoppel.

Ignoring the oft repeated and familiar rule that an estoppel will not arise out of a void act (*Harvey* v. *City of St. Petersburg*, 138 Fla. 597, 189 So. 861; *Milwaukee Electric Ry. & Light Co.* v. *Village of Shorewood, supra*), the Court also overlooked two equally obvious Federal Constitutional principles, viz.: that an administrative finding not supported by evidence is a nullity and that a failure to resort to judicial review of such a finding will not constitute a waiver unless procedural due process is afforded.

In the case at bar the administrative determination of liability simply recited that:

> "Whereas, no objections thereto were made by any person interested in, or affected by said assessment roll and the said assessment roll appearing, in all respects, regular and in accordance with the requirements and provisions of the City Charter;"

Such an unsupported declaration constitutes a denial of procedural due process since it is obviously arbitrary and capricious.

> *Gallegos* v. *Nebraska,* 342 U.S. 55.
> Cf. *Frankfurter, J., in Schware* v. *Board of Bar Examiners,* 353 U.S. 232.

In *Morgan* v. *U. S.,* 298 U.S. 468, the Court in speaking of the effect of administrative findings held:

> "* * * For the weight ascribed by the law to the finding * * * their conclusiveness when made within the sphere of the authority conferred * * * rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusion which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."

The Florida Supreme Court is in accord with this. In *Fisher* v. *Board of County Commissioners of Dade County,* Fla., 84 So. 2d 572, the court said:

> "A 'special benefit assessment' must be levied according to the particular benefits received by the real property in question and in order to sustain the assessment, there must be some proof of the benefits other than the dictum of the governing agency."

The failure to pursue the statutory charter remedy likewise offers no justification for a denial of a constitutional right to be heard. The provisions in the act for judicial review was obviously violative of Florida constitutional provisions, since it sought to regulate the practice of courts of justice by a local, rather than a general law. (*Skinner* v. *City of Eustis*, 147 Fla. 22, 2 So. 2d 116, 135 A.L.R. 359*). While this question may be within the ambit of *Houston & T.P.R. Co.* v. *Texas*, 177 U.S. 66, and similar cases, we mention the point here solely to emphasize the extent to which substantial grounds were ignored by the court below in its determination to sustain the controverted liens.

More to the point is the fact that the right of review was required to be exercised within ten days from the date of the confirmation of the assessment roll, yet no provision was made for notifying affected persons as to the time when this act was done. Actually in the Hamilton case the assessment roll was confirmed—not on the return day of the newspaper notice—but several days later. Yet this fact, on which a right to judicial relief is claimed to depend, was never communicated to the property owners.

On the merits, the lower court's adherence to such sterile formalism becomes the less comprehensible when it is considered that actually the suits at bar were brought within 48 and 57 days after the abortive confirmation. To bar substantial rights because of the lapse of so small a time hardly comports with accepted notions of fairness and equity. This is especially so when the limitation it-

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*In this case the Court held that a limitation of six months in a City Charter was violative of Florida Const., Art. III, Sec. 20, prohibiting the passage of local laws regulating the practice of courts of justice.

self is so short (10 days) as almost to preclude the examination of the proceedings and the preparation of adequate pleadings.

In *Hayes* v. *Douglas County*, 92 Wis. 429, 65 N.W. 482, the headnote states:

> "A statute preventing a property owner from contesting the validity of an assessment for a public improvement after the expiration of forty days after proceedings therefor were commenced, based on constructive notice, is unconstitutional."

and in the opinion the court holds:

> "While it is, no doubt, convenient and desirable, on the part of the municipality, that all questions in respect to the validity of such proceedings shall be put at rest as soon as may be, still there is no such exigency as to justify even an apparently unfair abbreviation of the rights of property owners or undue advantage taken. The time allowed should be ample to afford a reasonable probability that he would become informed of the proceedings against his property, and be fairly able to assert his right, before it is finally barred. It is considered that, plainly, this statute does not afford such reasonable opportunity, and cannot be sustained as a valid limitation. A short statute of limitation, is not an allowable substitute for due process of law. It is utterly subversive of that constitutional protection to private rights of property. The fact that such short limitations have been sustained by some courts does not persuade the court that they are just and supportable on principle."

While offering no justification for the exercise of Federal jurisdiction in forbidden fields, it is not without significance that the amended complaint on which relief was accorded in the trial court affirmatively alleged that the complaining property owners had not pursued the statutory charter remedy for judicial review of the assessments.

This complaint was sustained in the Supreme Court of Florida against the City's motion to dismiss, and in the face of the contention that the property owners were estopped by the administrative proceedings. *City of Miami* v. *Hamilton*, Fla., 73 So. 2d 715. Thereafter that Court in reversing the decree based upon such complaint, not only ignored applicable and controlling decisions of this Court on Federal Constitutional questions, but ignored its own oft repeated statement that decisions rendered by it on prior appeals became the law of the case and were not subject to reexamination. In *Hamel* v. *Danko*, Fla., 82 So. 2d 321, the court said:

> "We said in Hunter v. Tyner, Supra (151 Fla. 707, 10 So. 2d 494), in reference to the review of an interlocutory order in an equity suit, and now reiterate, 'A writ of this kind being simply a method of procedure by which such appeals authorized by the statute can be brought to this court, its denial, we think, was an adjudication of the propriety of the order involved and it could not again be questioned in this appeal.' "

In the face of these pronouncements, the reasons for the majority opinion here sought to be reviewed exfoliate into conjecture.

CONCLUSION.

If the Charter had afforded adequate notice of the administrative proceedings as required by the Federal Constitution, the Circuit Court would have held, as it actually did, that the entire assessment as to Appellants' property was void, since no benefits were conferred by the resurfacing. This judgment would then have been affirmed by the Supreme Court of Florida under its invariable rule that decrees based upon factual determinations are not subject

to being over turned, except by the showing of clear error. In short, if the property owners had had any notice that the City Commission would hear their objections to the confirmation of the assessment roll, they would certainly have filed protests with the Commission. If the Commission had overruled the objections, the property owners would certainly have appealed. On appeal, the Court would have held the assessment void, as it did in the instant cases. Therefore, the only answer that the City can give to an unconscionable imposition of liens upon the Appellants' property is that they failed to respond to a newspaper notice and did not bring a suit in the Circuit Court within ten days after the confirmation of the assessment roll, which took place on a date about which they were not notified.

This statement accurately demonstrates that the opinion of the Supreme Court of Florida sustained statutory municipal action that completely ignored the Appellants' constitutional rights. The jurisdiction of this Court is plain and the appeal should be allowed.

We can think of no better characterization of the situation here complained about than a statement of the Supreme Court of California in *Spring Street Co.* v. *City of Los Angeles,* 170 Cal. 24. In this case, speaking of an assessment district, the Court quoted from an early Vermont case, as follows:

> "We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confisca-

tion. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name. Allen v. Drew, 44 Vt. 174."

Respectfully submitted,

.....,

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APPENDIX

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APPENDIX "A".

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1957

EN BANC

THE CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Laws of the State of Florida, Appellant, vs. NORTON R. GANGER and L. C. BETHART et al., Appellees.	Case No. 28,057.

Opinion filed January 30, 1957.

An Appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

J. W. Watson, Jr., City Attorney and Robert M. Haverfield, Assistant City Attorney, for Appellant.

Anderson & Nadeau and Clyde A. Epperson, for Appellees.

THOMAS, J.:

The appellant by resolution created a Highway Improvement District, published a notice that at a designated time "objections would be heard to the confirmation of such resolution," to quote from the decree, and subsequently improved a certain street described in the resolution and the notice by applying a one-half inch "leveler" course and a one inch surface course. The base of the

street and the curbs and gutters were not disturbed. In other words, the city resurfaced the existing street and undertook by the resolution to charge the cost, except for improving the intersections, to the abutting owners.

The judge decided that the notice was insufficient and that the appellant lacked the authority to impose the cost of an improvement of this nature upon the property owners. He appointed a master to ascertain what amounts had been paid by the various owners on the liens that had been filed to secure payment of the assessments, evidently with the view of later ordering the owners reimbursed.

We will detail the reasons for the rulings as we discuss the questions presented in the briefs.

The appellant claims that authority for the procedure was granted by Sec. 56 of the city charter, Chapter 10847, Laws of Florida, Special Acts of 1925, as amended. In that act we find that the city has the power to grade, pave, repave, macadamize and remacadamize streets and specially assess the cost against adjacent property. Improvements and the eventual assessments are initiated by resolution of the city commission defining the termini and routes and the character of the work proposed.

After adoption of the resolution, plans and specifications for the work showing the estimated cost are prepared by the manager and filed with the city clerk. When these are filed, the clerk is required to publish "once in a daily newspaper of general circulation" a notice that at a meeting of the commission "on a certain day and hour" objections of interested persons to the confirmation of the resolution will be heard. The notice must contain, though it may be in brief or general terms, the description and location of the improvement and a statement that plans, specifications and estimates have been filed.

So to generate the power vested by the statute, the resolution must be adopted, and to secure due process to those who must pay the cost, or whose property will be responsible for it, the notice defined in the law must be given.

The notice involved in the instant litigation follows: "All interested will take notice that at a meeting of the City Commission at 9:30 o'clock A. M. December 3rd, 1952, their objections will be heard to the confirmation of Resolution No. 25006, adopted November 19th, 1952, ordering paving improvements on South Miami Avenue, from S. W. 15th Street Road to 200′ more or less south of Alatka Street, designated improvement H-503.

"Plans, specifications and estimate of cost of said improvements are on file in the City Clerk's office.

F. L. Correll,
City Clerk."

November 22, 1952.

When we place side by side the relevant section of the charter and the notice we have fully quoted, it is plain to us that the latter contained all elements required by the statute. It was published once in a newspaper of general circulation, The Miami Herald; it carried the date and hour of the meeting of the city commission at which complaints would be entertained; it contained a brief general description of the location where the improvement would be made; and it included the statement that the plans, specifications and estimates had been filed with the clerk.

The appellees seem to have convinced the circuit court that there were five defects rendering the notice insufficient: (1) failure to mention the place, that is, the city, where the objections would be heard, (2) absence of the name of the city commission which would hear them, (3) omission of the name of the city where the streets lay; (4)

want of identity of the signatory; (5) insertion of the notice in the classified section of the Herald.

The law only requires that persons interested be notified that protests will be heard at a meeting of the commission, and that the day and hour the commission will meet for the purpose be shown. No mention is made about naming in the notice the place where the commission would hold the particular meeting.

It seems to us that an interpretation that a property owner who wished to object to the proceeding would not be sufficiently informed to be able to locate a meeting of the commission of the city of Miami would be far-fetched. We have the same view about the complaint that the commission that would hear the complaints was not named. In the description of the street appears the familiar title "South Miami Avenue," and the notice appeared in The Miami Herald. We apprehend that few citizens of this state and no owners of property in Miami at all, especially on Miami Avenue between S. W. 15th Street and the vicinity of Alatka Street, would be unaware that these titles pertain to that city. We conclude that anyone purchasing an edition of the Herald and reading the notice would be fully conscious of the nature, place and purpose of the meeting.

Our reaction to the next two so-called imperfections, lack of identity of the city and the signer of the notice, is the same for the same reasons.

As for the position in the paper, among the classified advertisements, we simply say that the publication is the test and that there is no requirement that the notice shall appear in any special section of the newspaper. Actually the notice did appear under the caption "CLASSIFIED INFORMATION" but immediately above it was the title

"LEGAL NOTICES." We think this position was quite appropriate.

"The purpose of notice under proceedings of this kind is to secure to the owner the opportunity to protect his property from the lien of the proposed tax * * * and, in order to be effectual, it should be so full and clear as to disclose to persons of ordinary intelligence *in a general way* what is proposed and when and where property owners may be heard." (Italics supplied). *Escott* v. *City of Miami*, 107 Fla. 273, 144 So. 397.

We consider that the notice substantially conformed to the statute and that any protestant was advised when he could appear and where he could get full information about the contemplated work inasmuch as the plans, specifications and estimates were shown to be on file in the clerk's office and to relate to a certain numbered resolution dealing with improvement of a stated street.

On the matter of the validity of the notice we must disagree with the chancellor, and by disagreeing, we cannot adopt the view that the property owners could ignore the notice and at this late date successfully attack the action of the city, on the ground that due process had not been afforded them.

The chancellor thought that "*resurfacing* was necessary to keep the street in repair and facilitate the flow of traffic" and that the "work was for the benefit of the general public, and the abutting owners received no special benefit."

We can understand the potency of an argument that once a street is paved the cost of maintaining it should be borne by the public. Although we cannot agree that keeping a street in good repair is of no special benefit whatever to the property it bounds, we think that the power to maintain and assess the cost to adjacent property must

be found in the charter, and in our search we have not discovered that the municipality was granted the power to "resurface" and assess the costs as in the case of original or new construction. There is no doubt that the city could grade, pave and macadamize and it is clear from the use of the prefix "re" that grading, paving and macadamizing could be done again or anew and liens placed on the property to cover the cost. Presumably a street could so deteriorate that it would be necessary to repeat the work that had made it a graded, paved or macadamized way for the use of vehicles. But we agree with the circuit judge that "surfacing" is not a synonym of the other gerunds used in the act. Definitions of the words "surface" and "surfacing" appearing in available dictionaries indicate that they describe a face or covering of a body as distinguished from the other dimensions. To surface, according to one authority, is to make smooth, or put a surface on, such as "surface a road." Thorndike-Barnhart dictionary. The total application consisted of a coating an inch and a half in thickness and when this work is considered with the nature of a street, it seems to us that the circuit judge was not illogical in his holding that the layers were to make smoother a street worn by traffic, and that the improvement was in effect maintenance as distinguished from construction or reconstruction.

In conclusion we state that the word "resurfaced" was not the choice of the circuit judge. The relevant part of the resolution was that a certain street be "resurfaced * * * with approximately ½" leveling course and 1" surface course of asphaltic concrete * * *." To do the work was within the power of the city; to assess it against abutting property was without such power.

The city had no inherent right to levy special assessments; such power could have been invested in it only by

the legislature. *City of Coral Gables* v. *Coral Gables, Inc.*, 119 Fla. 30, 160 So. 476. The power to assess for what was obviously repairs was lacking. The assessments were, therefore, void. The payment of assessments by some of the owners would not operate as an estoppel because that doctrine is inapplicable when an assessment is void. *Gulf View Apartments, Inc., et al.* v. *City of Venice*, 108 Fla. 41, 145 So. 842. The appellees were entitled to the relief they sought and were granted.

Affirmed.

TERRELL, C. J., and ROBERTS, J., concur

THORNAL, J., concurs specially

HOBSON, DREW and O'CONNELL, JJ., dissent

THORNAL, J., Concurring Specially:

I concur in the judgment of affirmance. I agree with all of the opinion of Mr. Justice Thomas save that portion which in effect holds that the City Charter did not authorize the levy of an assessment for special benefits to particular property which might result from the "re-surfacing" of a street. In my view, authority to assess the cost of "re-macadamizing" a street is tantamount to authority to assess for "re-surfacing" a street. However, in order to justify the assessment the improvement must redound to the special benefit of the property that is being assessed. *Utley* v. *City of St. Petersburg*, 107 Fla. 6, 144 So. 58; *Fisher* v. *Board of County Commissioners of Dade County*, (Fla. 1956), 84 So. 2d 572.

Here the trial judge specifically found that "the work was for the benefit of the general public, and the abutting owners received no special benefit". The record abounds in evidence more than adequate to sustain this conclusion.

For the foregoing reasons and the reasons announced by Mr. Justice Thomas on the other points, I would affirm the decree.

DREW, J., dissenting in part:

I agree with that portion of the opinion of Mr. Justice Thomas holding that the original notice of the City of Miami of its intention to construct and install the improvements which are the subject matter of this litigation was valid and effectual but I must respectfully dissent from the affirmance of the decree appealed from which holds these assessments to be invalid and void. I am impelled to this conclusion for two basic and fundamental reasons.

It is stated in the opinion of Mr. Justice Thomas "Although we cannot agree that keeping a street in good repair is of no special benefit whatever to the property it bounds, we think that the power to maintain and assess the cost to adjacent property must be found in the charter, and in our search *we have not discovered that the municipality was granted the power to 're-surface' and assess the costs* as in the case of original or new construction." I cannot agree with this statement. Section 56 of the city charter authorizes special assessments for highway improvements which the act says embraces "the grading, paving, *repaving*, macadamizing and *remacadamizing* of highways * * *." I don't see how the Legislature could have more clearly vested the power in the city to do the very work covered by the resolution and to make such assessments therefor against the abutting property in proportion to the benefit it receives. I think it is pertinent to note that the opinion of Mr. Justice Thomas concedes that such work was beneficial to the abutting property. The results reached turn squarely on the proposition, as I view it, that the city lacked authority to do the work which afforded the basis of the special assessment.

The words "macadamizing" and "remacadamizing" embrace the identical subject as "surfacing" or "resurfacing." "Macadamizing" a road merely contemplates or embraces a layer or surface over the rock, stone or cement which constitutes the road itself. "Macadamizing" is sometimes referred to as "slag" but may be any substance covering the top or surface of the road put there for smoothness or safety. Webster's Collegiate Dictionary, Fifth Edition, describes "macadamize" as "to construct or finish a road by packing a layer of small broken stone on a convex well-drained earth roadbed." "Macadam", according to the foregoing authority, is the "broken stone used in macadamizing." In 54 C.J.S. 890, "macadamize" is described as follows: "While it has been observed that the meaning of the word 'macadamize' is susceptible of variation, according to the particular relation in which it is employed, it is said to have a fixed and definite meaning. It has been defined as meaning to cover a road or path with small broken stones, which uniting by pressure form a smooth hard surface; to cover, as a road, way, or path, with small stones, so as to form a smooth laid surface; to cover as a roadway surface; to cover a street or road by the process introduced by Macadam, which consists of the use of small stones, of a uniform size, consolidated and leveled by heavy rollers. The term may refer not only to the kind of material to be used in covering a street or road, but also the manner in which it is to be laid."

Moreover, the pertinent portion of Section 56 of the city charter clearly and unequivocally authorizes special assessments not only for grading, paving, macadamizing of highways in the beginning but also authorizes a special assessment where it is necessary to repave or remacadamize. I don't see how the act could be any clearer with reference to this subject nor how one would go about the preparation of such a provision for inclusion in a city charter which

would make it any clearer than that contained in Section 56.

Nor can the words of Section 56, viz. "pave and repave" be ignored. In essence these words mean to produce or reproduce a smooth surface so that "repave" and "resurface" would be indistinguishable within the intent and clear language of the act. See 76 C.J.S., p. 1175, especially test to note 30 and 54 C.J. 401. Cf. *McDonald* v. *Fraleigh*, 86 Fla. 577, 98 So. 830 (1923).

Another basic and fundamental reason why I cannot agree to the result reached by the trial court and approved by the foregoing opinion which holds these assessments to be void is the failure of the appellees to act promptly in the matter.

Holding as we do that the original notice of the intention of the City of Miami to install these improvements and assess a portion of the cost against the abutting property was valid in all respects, the failure of the appellees to promptly assert their rights in the premises now estops them from maintaining an action, the ultimate objective of which is to declare the assessments invalid. It was the duty of the appellees to promptly assert their position when the City obtained jurisdiction of the improvement by virtue of the passage of the initial resolution and the giving of what we hold to be a valid and legal notice.

While all of the decisions of this Court may not be completely reconciled on this question, our latest expression in the case of *Rosche* v. *City of Hollywood*, 55 So. 2d 909 (Fla. 1952), clearly answers this contention adversely to the contention of appellees. In that case we made the following unequivocal holding:

> " 'The defendant city also contends that plaintiffs are estopped to maintain this action for the cancella-

tion of the special assessments for the improvements on these streets. This point, in my opinion, is well taken. Plaintiffs had direct notice of the ordinances providing for street improvements; they saw the pavement being put down and were well aware that part, or all of the cost thereof, would have probably been assessed against their properties. They stood idly by when they could have filed their protests with the City Commission, or could have resorted to a Court of Equity to restrain the paving of the streets, and the levying of the assessments thereon. They remained silent for two years after the City became liable for the cost of the paving of the streets and did nothing. Having failed to avail themselves of any of the remedies provided for their protection under the laws of Florida, and not having shown fraud or bad faith on the part of the City Commissioners in making the assessments, they should now be held to be estopped to do so. It, therefore, follows that the exceptions to the Special Master's report should be sustained and the bill of complaint dismissed.' "

Any other conclusion would be disastrous to the fiscal affairs of the city and could well result in municipal bankruptcy.

It is stated in the foregoing opinion of Mr. Justice Thomas: "The payment of assessments by some of the owners would not operate as an estoppel because that doctrine is inapplicable when an assessment is void." As authority for that statement the case of *Gulf View Apartments, Inc., et al.* v. *City of Venice*, 108 Fla. 41, 145 So. 842 is cited. In the cited case, however, the property owner waited nearly two years after the assessment was made to institute a suit to set it aside and the court there held, as it did in *Rosche* v. *City of Hollywood*, *supra*, that under the circumstances shown by the record in that case and because objections were not seasonably filed, the owner was estopped to question the validity of the assessment.

The property owner in that case had never paid any portion of the assessment and the only reference in the opinion concerning estoppel in instances where the assessment is wholly void is the gratuitous statement "We are conscious of the rule to the effect that the doctrine of estoppel has no application where an assessment is void." In the companion case of *City of Miami* v. *Hamilton, et al.*, now also under consideration by us, it appears that some of the property owners have paid either all or a portion of these assessments and the court in its decree has retained jurisdiction with reference to these payments, obviously for the purpose of later providing for their repayment by the city to the property owners. It is extremely doubtful even in the case of a void assessment whether the property owner may recover such assessment even though he may not be estopped from denying his liability for the balance. McQuillin on Municipal Corporations, (3rd Ed.), Vol. 14, Sec. 38.194.

I, therefore, respectfully dissent and would reverse the decree appealed from.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1957

EN BANC

THE CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Laws of the State of Florida,
Appellant,

vs.

THOMAS H. HAMILTON et als.,
Appellees.

Case No. 28,058.

Opinion filed January 30, 1957.

An Appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

J. W. Watson, Jr., City Attorney and Robert M. Haverfield, Assistant City Attorney for Appellant.

Anderson & Nadeau, for Appellees.

PER CURIAM.

Affirmed on authority of *The City of Miami* v. *Norton R. Ganger and L. C. Bethart et al.*, filed this date.

TERRELL, C. J., THOMAS, ROBERTS and THORNAL, JJ., concur.

HOBSON, DREW and O'CONNELL, JJ., dissent.

DREW, J., dissenting:

I respectfully dissent for the reasons stated in *City of Miami* v. *Norton R. Ganger and L. C. Bethart et al.*, opinion filed this date.

IN THE SUPREME COURT OF FLORDIA

JULY TERM A. D. 1957

THE CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Laws of the State of Florida,
Appellant,

vs.

NORTON R. GANGER and L. C. BETHART et al.,
Appellees.

Case No. 28,057.

Opinion filed October 11, 1957.

An Appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

J. W. Watson, Jr., City Attorney and Robert M. Haverfield, Assistant City Attorney for Appellant.

Anderson & Nadeau and Clyde A. Epperson, for Appellees.

On Rehearing Granted.

DREW, J.

The answer to the question of whether the City had the power to repair the streets in the manner described in the opinion by Mr. Justice Thomas and to assess a portion of the cost thereof against the abutting property owners is found in the clear and unequivocal language of Section 56 of the city charter.[1] This legislative act provides "A local

[1]Ch. 10847, Special Acts of 1925.

improvement is an improvement defined by this section and made under the provisions hereof." It further describes the classes of improvements "authorized to be made under the provisions of this act." There are five classes of improvements so designated but for the purpose of this discussion, we need concern ourselves directly only with class one. The following is the exact language of the city charter describing an authorized improvement under the act for which special assessments benefits may be made.

> "CLASS 1. High improvements embrace the grading, paving, *re-paving*, macadamizing and *re-macadamizing* of highways, with necessary drainage, sewer inlets, manhole and catch basins and, if the Commission so orders, may embrace curbs and gutters." (Emphasis supplied).

There are many significant words in this quotation. The first word is "improvement". This clearly symbolizes making better something which already exists. Webster, among other things, defines "improvement" as "betterment" and "state of being improved". The language of the act provides not merely for grading, paving and macadamizing a street but also uses the words "re-paving" and "re-macadamizing". This is a clear legislative grant of power to do exactly what was done in the instant case. It is difficult to understand what words the Legislature could have used which would more clearly have vested the power in the City to do the work covered by the resolution and make assessments therefor against the abutting property. The words "macadamizing" and "re-macadamizing" embrace the identical subject as "surfacing" or "re-surfacing". "Macadamizing" a road merely contemplates or embraces a layer or surface over the rock, stone or cement which constitutes the road itself. "Macadamizing" is sometimes referred to as "slag" but may be any substance covering the

top or surface of the road put there for smoothness or safety. Webster's Collegiate Dictionary, Fifth Edition, describes "macadamize" as "to construct or finish a road by packing a layer of small broken stone on a convex well-drained earth roadbed." "Macadam", according to the foregoing authority, is the "broken stone used in macadamizing." In 54 C.J.S. 890, "macadamize" is described as follows: "While it has been observed that the meaning of the word 'macadamize' is susceptible of variation, according to the particular relation in which it is employed, it is said to have a fixed and definite meaning. It has been defined as meaning to cover a road or path with small broken stones, which uniting by pressure form a smooth hard surface; to cover, as a road, way or path, with small stones, so as to form a smooth laid surface; to cover as a roadway surface; to cover a street or road by the process introduced by MacAdam, which consists of the use of small stones, of a uniform size, consolidated and leveled by heavy rollers. The term may refer not only to the kind of material to be used in covering a street or road, but also the manner in which it is to be laid." Moreover the words used in the quoted section of the city charter "pave and re-pave" are of significance to this discussion. In essence these words mean to produce or re-produce smooth surface so that "re-pave" and "re-surface" would be indistinguishable within the intent and clear language of the act. See 76 C.J.S., p. 1175, especially text to note 30 and 54 C.J. 401. *C. F. McDonald* v. *Fraleigh*, 86 Fla. 577, 98 So. 830 (1923). It may not appeal to some to allow a city to assess for the cost of re-paving or re-surfacing a street but it is unquestionably within the power of the Legislature to authorize such to be done. We reiterate that such power could hardly have been vested in language of clearer import and meaning than that contained in the city charter.

Holding then, as we unanimously do, that the notice discussed in the opinion by Mr. Justice Thomas was in all respects regular and in full compliance with the provision of the city charter relating to special assessments for benefits, we now direct our attention to the requirements placed by the law upon the property owner if he desires to contest the regularity of the proceedings, the power of the city to make the assessments or the amount of the assessments determined to be chargeable against the respective parcels of land.[2]

This is not the first time this section 56 of the city charter has been before this Court; nor is it the first time we have had occasion to deal with the duty and responsibility of the property owner to promptly object to the city commission if he has a grievance with reference to a proposed improvement. In *Escott* v. *City of Miami*, 144 So. 397 (Fla. 1932), in speaking of this identical section of the city char-

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[2]The resolution authorizing the work and establishing the highway improvement tax district was adopted November 19, 1952. This suit in equity was commenced April 1, 1954.

The resolution was approved by the City Commission after a hearing on December 3, 1952, at which no objections were offered.

Bids were advertised for, contracts awarded and the improvements completed. The Clerk published notice prior to a hearing on June 3, 1953, where no objections were made to the improvements, and they were then accepted.

After a preliminary tax roll had been prepared, the clerk published notice of a hearing on February 3, 1954, for objections to confirmation of the roll. At the hearing, where there were no objections, the City Commission confirmed the assessments, finding: "That the sums and amounts assessed against each of the lots or parcels of ground in said preliminary rolls are less than the amount that each of the said lots or parcels of ground is especially benefited by said improvement and that such amounts are in proportion to the special benefits that the property received * * *."

ter, after holding the original notice to have been validly given, we said:

> "If the property owner had notice, and in this case we have held that he did have, his *only* method of questioning any error or irregularity in the proceedings was by filing objections before the city commission, and, if overruled there, by filing his special appeal to the circuit court, in the manner provided by the charter.
>
> "Where a property owner has an opportunity given him, under a statute providing for special assessments for local improvements, to appear and contest the question before the local authorities whose duty it is to pass upon objections, *their determination on the subject of benefits is final, and, if he fails to avail himself of the opportunity provided by the statute, he thereby admits the finality of the determination, and is estopped to raise the question in subsequent proceedings, such as by suit in equity to enjoin the enforcement of assessments which have become conclusive under the statute.*" (Emphasis supplied).

See also *Rosche* v. *City of Hollywood*, 55 So. 2d 909 (Fla. 1952), and *Summerland, Inc.*, v. *City of Punta Gorda*, 134 So. 611 (Fla. 1931).

Section 56 of the charter of the City of Miami provides in detail the steps to be taken by the City officials in authorizing public improvements, the costs of which are to be paid in whole or in part by the owners of the land abutting said improvements and especially benefited thereby. The various notices required to be published are for the purpose of advising the property owners affected of the nature and extent of the improvements, the extent of the assessments to be made against the land to be especially benefited thereby and the details of such construction so that the affected property owners may be fully advised as to what is con-

templated, the approximate cost of the improvement and the approximate amount to be ultimately assessed against the affected property. These requirements of the charter serve not only to protect the property owner by giving him notice of contemplated improvements so that he may take timely action either before the city commission or in the courts to protect his interest in the matter but it serves also to afford the municipal government the opportunity of financing such improvements and a means of setting in repose questions of the validity of such proceedings and the assessments to be made pursuant thereto. Such proceedings serve much the same purpose as validation proceedings under Chapter 75, F. S. A. Both are necessary to the efficient and orderly financing of civic improvements and are a necessary adjunct of fiscal management. It would be disastrous to the fiscal affairs of the City and detrimental to the general welfare of its citizens if the validity of such assessments was constantly open to question. The orderly administration of the affairs of the city require that the property owner make timely objection and it imposes no undue burden on him to do so. We specifically pointed out in *Summerland, Inc.*, v. *City of Punta Gorda, supra*, that a property owner who stands by and permits a public improvement to be made to the benefit of his property under authority of a tribunal vested with the power to levy such assessment may be estopped from raising objections thereto by sleeping on his rights and not promptly asserting them even though had they been timely raised, such objections might have rendered the assessment invalid. The failure of the property owners here to promptly assert whatever rights they had or make any effort to comply with the applicable provisions of the city charter now estops them from questioning the validity or amount of these assessments.

I am authorized to say that Mr. Justice Hobson, Mr. Justice Thornal and Mr. Justice O'Connell concur in these views.

The judgment appealed from is reversed with directions to dismiss the complaint.

HOBSON, THORNAL and O'CONNELL, JJ., Concur

TERRELL, C. J., THOMAS and ROBERTS, JJ., Dissent

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1957

THE CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Laws of the State of Florida,
Appellant,

vs.

NORTON R. GANGER and L. C. BETHART et al.,
Appellees.

THOMAS, J., Dissenting

The appellant by resolution created a Highway Improvement District, published a notice that a designated time "objections would be heard to the confirmation of such resolution," to quote from the decree, and subsequently improved a certain street described in the resolution and the notice by applying a one-half inch "leveler" course and a one inch surface course. The base of the street and the curbs and gutters were not disturbed. In other words, the city resurfaced the existing street and undertook by the resolution to charge the cost, except for improving the intersections, to the abutting owners.

The judge decided that the notice was insufficient and that the appellant lacked the authority to impose the cost of an improvement of this nature upon the property owners. He appointed a master to ascertain what amounts had been paid by the various owners on the liens that had been filed to secure payment of the assessments, evidently with the view of later ordering the owners reimbursed.

We will detail the reasons for the rulings as we discuss the questions presented in the briefs.

The appellant claims that authority for the procedure was granted by Sec. 56 of the city charter, Chapter 10847, Laws of Florida, Special Acts of 1925, as amended. In that act we find that the city has the power to grade, pave, repave, macadamize and re-macadamize streets and specially assess the cost against adjacent property. Improvements and the eventual assessments are initiated by resolution of the city commission defining the termini and routes and the character of the work proposed.

After adoption of the resolution, plans and specifications for the work showing the estimated cost are prepared by the manager and filed with the city clerk. When these are filed, the clerk is required to publish "once in a daily newspaper of general circulation" a notice that at a meeting of the commission "on a certain day and hour" objections of interested persons to the confirmation of the resolution will be heard. The notice must contain, though it may be in brief or general terms, the description and location of the improvement and a statement that plans, specifications and estimates have been filed.

So to generate the power vested by the statute, the resolution must be adopted, and to secure due process to those who must pay the cost, or whose property will be responsible for it, the notice defined in the law must be given.

The notice involved in the instant litigation follows: "All interested will take notice that at a meeting of the City Commission at 9:30 o'clock A. M. December 3rd, 1952, their objections will be heard to the confirmation of Resolution No. 25006, adopted November 19th, 1952, ordering paving improvements on South Miami Avenue, from S. W.

15th Street Road to 200' more or less south of Alatka Street, designated improvement H-503.

"Plans, specifications and estimate of cost of said improvements are on file in the City Clerk's office.

November 22, 1952.

F. L. Correll,
City Clerk."

When we place side by side the relevant section of the charter and the notice we have fully quoted, it is plain to us that the latter contained all elements required by the statute. It was published once in a newspaper of general circulation, The Miami Herald; it carried the date and hour of the meeting of the city commission at which complaints would be entertained; it contained a brief general description of the location where the improvement would be made; and it included the statement that the plans, specifications and estimates had been filed with the clerk.

The appellees seem to have convinced the circuit court that there were five defects rendering the notice insufficient: (1) failure to mention the place, that is, the city, where the objections would be heard, (2) absence of the name of the city commission which would hear the, (3) omission of the name of the city where the streets lay; (4) want of identity of the signatory; (5) insertion of the notice in the classified section of the Herald.

The law only requires that persons interested be notified that protests will be heard at a meeting of the commission, and that the day and hour the commission will meet for the purpose be shown. No mention is made about naming in the notice the place where the commission would hold the particular meeting.

It seems to us that an interpretation that a property owner who wished to object to the proceeding would not

be sufficiently informed to be able to locate a meeting of the commission of the city of Miami would be far-fetched. We have the same view about the complaint that the commission that would hear the complaints was not named. In the description of the street appears the familiar title "South Miami Avenue," and the notice appeared in The Miami Herald. We apprehend that few citizens of this state and no owners of property in Miami at all, especially on Miami Avenue between S. W. 15th Street and the vicinity of Alatka Street, would be unaware that these titles pertain to that city. We conclude that anyone purchasing an edition of the Herald and reading the notice would be fully conscious of the nature, place and purpose of the meeting.

Our reaction to the next two so-called imperfections, lack of identity of the city and the signer of the notice, is the same for the same reasons.

As for the position in the paper, among the classified advertisements, we simply say that the publication is the test and that there is no requirement that the notice shall appear in any special section of the newspaper. Actually the notice did appear under the caption "CLASSIFIED INFORMATION" but immediately above it was the title "LEGAL NOTICES." We think this position was quite appropriate.

"The purpose of notice under proceedings of this kind is to secure to the owner the opportunity to protect his property from lien of the proposed tax * * * and, in order to be effectual, it should be so full and clear as to disclose to persons of ordinary intelligence *in a general way* what is proposed and when and where property owners may be heard." (Italics supplied). *Escott* v. *City of Miami*, 107 Fla. 273, 144 So. 397.

We consider that the notice substantially conformed to the statute and that any protestant was advised when he could appear and where he could get full information about the contemplated work inasmuch as the plans, specifications and estimates were shown to be on file in the clerk's office and to relate to a certain numbered resolution dealing with improvement of a stated street.

All members of the court agree to the preceding opinion with reference to the sufficiency of the notice but the opinion which follows is that only of Terrell, C. J., Roberts, J., and the writer. Although we three cannot adopt the view that the property owners could ignore the notice and at this late date successfully attack the action of the city, on the ground that due process had not been afforded them, we believe that the property owners can assail the liens on the ground that the city did not have the power to create them under the circumstances.

The chancellor thought that "*resurfacing* was necessary to keep the street in repair and faciliate the flow of traffic" and that the "work was for the benefit of the general public, and the abutting owners received no special benefit."

We can understand the potency of an argument that once a street is paved the cost of maintaining it should be borne by the public. Although we cannot agree that keeping a street in good repair is of no special benefit whatever to the property it bounds, we think that the power to maintain and assess the cost to adjacent property must be found in the charter, and in our search we have not discovered that the municipality was granted the power to "re-surface" and assess the costs as in the case of original or new construction. There is no doubt that the city could grade, pave and macadamize and it is clear from the use

of the prefix "re" that grading, paving and macadamizing could be done again or anew and liens placed on the property to cover the cost. Presumably a street could so deteriorate that it would be necessary to repeat the work that had made it a graded, paved or macadamized way for the use of vehicles. But we agree with the circuit judge that "surfacing" is not a synonym of the other gerunds used in the act. Definitions of the words "surface" and "surfacing" appearing in available dictionaries indicate that they describe a face or covering of a body as distinguished from the other dimensions. To surface, according to one authority, is to make smooth, or put a surface on, such as "surface a road." Thorndike-Bernhart dictionary. The total application consisted of a coating an inch and a half in thickness and when this work is considered with the nature of a street, it seems to us that the circuit judge was not illogical in his holding, based on the testimony of experts, that the layers were to make smoother a street worn by traffic, and that the improvement was in effect maintenance as distinguished from construction or reconstruction.

In conclusion we state that the word "resurfaced" was not the choice of the circuit judge. The relevant part of the resolution was that a certain street be "resurfaced * * * with approximately 1/2" leveling course and 1" surface course of asphaltic concrete * * *." To do the work was within the power of the city; to assess it against abutting property was without such power.

The city had no inherent right to levy special assessments; such power could have been invested in it only by the legislature. *City of Coral Gables* v. *Coral Gables, Inc.*, 119 Fla. 30, 160 So. 476. The power to assess for what was obviously repairs was lacking. The assessments were, therefore, void. The payment of assessments by some of

the owners would not operate as an estoppel because that doctrine is inapplicable when an assessment is void. *Gulf View Apartments, Inc., et al.* v. *City of Venice*, 108 Fla. 41, 145 So. 842. We three are convinced that appellees were entitled to the relief they sought and were granted.

Therefore we dissent.

TERRELL, C. J., and ROBERTS, J., CONCUR.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1957

THE CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Laws of the State of Florida,
Appellant,

vs.

THOMAS R. HAMILTON et als.,
Appellees.

Case No. 28,058.

Opinion filed October 11, 1957.

An Appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

J. W. Watson, Jr., City Attorney and Robert M. Haverfield, Assistant City Attorney, for Appellant.

Anderson & Nadeau, for Appellees.

PER CURIAM.

Reversed on the authority of City of Miami v. Ganger, opinion filed this date.

TERRELL, C.J., THOMAS, HOBSON, ROBERTS, DREW, THORNAL and O'CONNELL, JJ., concur.

APPENDIX "B".

Miami City Code, Section 56. Assessment of Individual Lots:

"(L) *Notice of hearing after filing preliminary assessment roll.* Upon the filing with the city clerk of the preliminary assessment roll required by this section, the city clerk shall publish once in each of two successive weeks in a daily newspaper of general circulation published in the city, a notice stating that at a regular meeting of the commission held on a certain day and hour, not less than twelve days from the date of the first publication, all interested persons may appear and file written objections to the confirmation of said roll.

"(M) *Hearing objections and actions thereon.* At the time and place stated in such notice the commission shall meet and receive the objections in writing of all interested persons as stated in said notice. Then or thereafter, the commission shall either annul or sustain or modify in whole or in part the *prima facie* assessment as indicated on said roll, either by confirming the *prima facie* assessment against any or all lots or parcels described therein, or by cancelling, increasing or reducing the same, according to the special benefits which said commission decides each of said lot or parcel has received, or will receive on account of such improvement. If any property which may be chargeable under this section shall have been omitted from said preliminary roll or if the *prima facie* assessment has not been made against it, the commission may place on said roll an apportionment to said property. The commission may thereupon confirm said roll, but shall not confirm any assessment in excess of the

special benefits to the property assessed, and the assessments so confirmed shall be in proportion to the special benefits. Forthwith after such confirmation said assessment roll shall be delivered to the director of finance, and such confirmation shall be final and conclusive except as hereinafter provided.

"(N) *Appeal to court.*—If the owners of any railroad, or any lot or parcel of land so assessed shall within ten days from such confirmation, file a written verified petition in the office of the clerk of the circuit court of Dade County, setting forth that the amount so assessed against any property of the petitioner exceeds the amount of the special benefit the petitioner has sustained or will sustain by reason of such improvement, or is out of proportion to benefits, or that the assessment is valid, for any reason whatsoever, and shall at the same time file with said clerk a written undertaking in at least the sum of two hundred dollars ($200.00), with a good and sufficient surety to be justified before and approved by the said clerk, to the effect that the petitioner will pay to said city all costs and damages to be sustained by it by reason of such proceeding, and shall, within ten (10) days from such conformation, deliver (to) the city manager or leave in his office a copy of said petition, then the validity of such assessment against said property shall be determined as hereinafter provided. Within ten (10) days after the delivery of said copy of petition then the validity of such assessment against said property shall be determined as hereinafter provided. Within ten (10) days after the delivery of said copy of petition to the city manager or, at his office, the city manager shall appear and answer the said petition, and the case shall be heard upon such petition and answer and upon such evidence as may be presented to the court. The judge of the court shall hear and

determine the cause, in term or vacation, giving such hearing and determination precedence over all other cases so far as the same may be practicable.

"The decision of the court in such proceedings shall be final and an appeal shall be allowed only if properly prayed and perfected ten (10) days from the date of the order; if the assessment against such property shall be sustained or reduced or abated by the court, the director of finance shall note that fact on the assessment roll opposite the description of the property whose assessment was so contested; the cost of any such proceedings shall be paid by the party complaining of such assessment, unless the said assessment is abated or is reduced by the court ten per cent (10%) or more, and judgment shall be rendered against him for the amount of such cost; in case such assessment shall be abated or shall be reduced ten per cent (10%) or more, such costs and expenses shall be paid by the city and judgment shall be entered against it for the amount thereof.

"(O) *Amount of assessment set aside by court may be charged to city or new assessment roll may be prepared.* The amount of the special assessment against any lot or parcel which may be set aside by the court, unless the assessment upon the entire district be set aside, or the amount by which such assessment is so reduced, may by resolution of the commission be made chargeable against the city at large, or, in the discretion of the commission a new assessment roll may be prepared and confirmed in the manner hereinbefore provided for the preparation and confirmation of the original assessment roll, except that no notice of hearing upon such roll need be published or given as to any property unless the assessment against it is increased. The commission shall take prompt action as herein provided in case of the reduction or invalidation of

any assessment, and any such action shall be noted by the director of finance on said assessment roll, unless a new roll shall be made and confirmed, in which case the former roll shall be a nullity and the right of petition to the circuit court as to the amounts apportioned by the new roll shall be in force as to such new roll."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

JUL 22 1958

No. 153

NORTON R. GANGER and L. C. BETHART, et al.,

Appellants,

vs.

CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Law of the State of Florida,

Appellee.

THOMAS B. HAMILTON and JANE Q. HAMILTON, his Wife, and HUNTER LYONS, INC., a Florida Corporation, et al.,

Appellants,

vs.

CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Law of the State of Florida,

Appellee.

Appeal from the Supreme Court of the State of Florida

MOTION TO DISMISS APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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Appeal from the Supreme Court of the State of Florida

MOTION TO DISMISS APPEALS

MOTION TO DISMISS APPEALS

The appellee, CITY OF MIAMI, a municipal corporation under the laws of the State of Florida, respectfully moves the Supreme Court of the United States to dismiss the appeal of the appellants, NORTON R. GANGER and L. C. BETHART, et al, from the opinion and judgment of the Supreme Court of Florida, reversing a final decree of the Circuit Court of Dade County, Florida, dated February 17, 1955, recorded in Chancery Order Book 1171, at Page 362, of the Public Records of Dade County, Florida, and filed in the Supreme Court of Florida on October 9, 1957; and to dismiss the appeal of the appellants, THOMAS B. HAMILTON and JANE Q. HAMILTON, his wife, and HUNTER LYON, INC., a Florida corporation, et al, from the opinion and judgment of the Supreme Court of Florida reversing a final decree of the Circuit Court of Dade County, Florida, dated February 17, 1955, recorded in Chancery Order Book 1171, at Page 385, of the Public Records of Dade County, Florida, and filed in the Supreme Court of Florida on October 9, 1957; and for grounds of this motion to dismiss said appeals, the appellee says:

1. The said appeals are not within the jurisdiction of the Supreme Court of the United States because not taken in conformity to statute or the rules of said Supreme Court, in that the Jurisdictional Statement of said appellants, required by Rule 15 of said rules, fails to set forth therein the following:

(a) Copies of the final decrees of the trial court, the Circuit Court of Dade County, Florida, which were reversed by opinions

and judgments of the Florida Supreme Court.

(b) Any statement showing that there was drawn in question the validity of a Florida statute on the ground of its being repugnant to the constitution, treaties or laws of the United States.

(c) The manner in which the questions presented by said appellants, were brought before the trial and appellate courts.

(d) Any statement showing when or how the questions sought to be reviewed were raised in the court of first instance or in the appellate court.

(e) Any statement showing how the questions sought to be reviewed were passed on by the court of first instance or the appellate court.

2. The Federal questions presented and sought to be reviewed by appellants (Pages 3-4 - Jurisdictional Statement), under 28 U.S.C. 1257 (2), involved only notice to property owners of Special Assessment for Paving, as prescribed by Section 56 of the charter of appellee, passed by the Florida Legislature in 1925 (Appendix Pages 31-34 of Jurisdictional Statement of appellants). Said Federal questions were not expressly passed on by the trial or appellate court. This is shown on the face of the Jurisdictional Statement of appellants. Said Jurisdiction Statement, as stated above in Ground 1 (a) of this Motion to

Dismiss Appeals, contained no opinion of the trial court attached thereto or made a part thereof. Only opinions of the appellate court were shown in said Jurisdictional Statement by copies thereof in the appendix thereto. Under these opinions, the holding of the trial court was first affirmed on January 30, 1957 and then, on rehearing, reversed on October 11, 1957. The said opinions of said appellate court, copies of which are in the appendix of said Jurisdictional Statement (Referred to hereinafter as "A"), show, in reference to the holding of the trial court concerning the sufficiency of the statutory notice, the following:

(a) The majority appellate opinion of Justice Thomas, of January 30, 1957, affirming the decree of the trial court, contained the following:

(i) "The judge decided that the notice was insufficient * * * * ". ("A" Page 4).

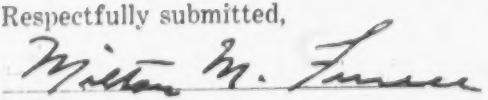
(ii) "The appellees seem to have convinced the circuit court that there were five defects rendering the notice insufficient: (1) failure to mention the place, that is, the city, where the objections would be heard, (2) absence of the name of the city commission which would hear them, (3) omission of the name of the city where the streets lay; (4) want of identity of the signatory; (5) insertion of the notice in the classified

section of the Herald." ("A" Pages 5-6).

(b) The dissenting opinion of Justice Thomas of October 11, 1957, repeated verbatim the words, quoted above under 2 (a)(i) which had been stated in his said opinion of January 30, 1957.

3. None of the said appellate opinions discussed any constitutional question. All of said appellate opinions, in discussing the statutory notice involved, discussed only the question of such notice complying with the requirements of the Florida statute. All of said opinions, those in favor of affirmance and those in favor of reversal of the trial court, held said statutory notice to be valid and strictly in accordance with the Florida statute. See majority opinion of Justice Thomas of January 30, 1957, and his dissenting opinion of October 11, 1957. ("A" Page 7 and Page 27). See concurring opinion of Justice Thornal of January 30, 1957. ("A" Page 9). See dissenting opinion of Justice Drew of January 30, 1957, and his majority opinion of October 11, 1957. ("A" Page 10, Page 12, and Page 19).

Respectfully submitted,



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Certificate of Service

I, Milton M. Ferrell, Attorney for Appellee, do hereby certify that I served the above and foregoing Motion to Dismiss Appeals by mail on the 17th day of July 1958, by placing two copies of said motion in each of two envelopes, one addressed to Clyde A. Epperson, Ingraham Building, Miami 32, Florida, and the other addressed to Anderson & Nadeau, 908 First National Bank Building, Miami, 32, Florida, and by depositing said envelopes in a United States Mail Box, with first-class postage prepaid, addressed to said persons, counsel of record for the appellants, as aforesaid, being their respective Post Office addresses.

Milton M. Ferrell

Milton M. Ferrell

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 153.

NORTON R. GANGER et al.,
Appellants,

vs.

CITY OF MIAMI,
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THOMAS B. HAMILTON et al.,
Appellants,

vs.

CITY OF MIAMI,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

APPELLANTS' REPLY TO MOTION TO DISMISS APPEAL.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 153.

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Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

APPELLANTS' REPLY TO MOTION TO DISMISS APPEAL.

Properly to consider appellee's contention that no federal question was raised and passed upon by the Supreme Court of Florida a brief restatement of what the suit is all about may help.

The Miami City Charter is a state statute. It permits the city to improve streets and charge the costs against abutting property. The statute requires that the proceedings be commenced by an initiating resolution. Notice of the adoption of the resolution must be given to abutting property owners. When the work is done and liens are imposed a hearing is had. Notice must be given to this hearing.

The charter only provides for a notice to be published in the newspaper and no other or further notice was given to the property owners, the appellants here.

The property owners contested the assessment by a suit in the State Circuit Court. The complaint challenged both the sufficiency of the notice and the want of benefits under the Fourteenth Amendment to the United States Constitution.

The city by its answer alleged that the property owners had received legal notice of the hearing and had made no objection to the assessment. It was asserted that, as a result of this inaction, they were bound by the determination of the city council that the property was benefited by the improvement. It was further contended that because of these conditions the property owners were estopped to challenge the validity of the assessment.

The Circuit Court held that the property owners were not estopped to challenge the existence of benefits because the notice, which the city had given, was insufficient as a matter of law and also,

> "because it was inserted in the classified section of the Miami Herald and in such a manner that it cannot be said that any reasonable person was put upon notice by it that their property was going to be subjected to a special assessment." (R. 21).

The Court then held that there had been no benefit to the abutting property by reason of the alleged improvement.

The State Supreme Court affirmed this decree on a non-federal ground viz.: that the city lacked authority to do the work. A minority of the Court dissented holding that the city did have such power and that the property owners could not challenge the assessments because they had ample legal notice of the imposition of the assessment liens.

The city petitioned for re-hearing which was granted and, in a subsequent opinion, the Court reversed the decree (three justices dissenting) and held that the notice was sufficient and that the appellants were estopped by the determination of benefits in the administrative proceedings.

The appellants petitioned for re-hearing assailing the holdings on the ground that it was contrary to the decision of this Court in *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306 and *Walker* v. *City of Hutchinson*, 352 U.S. 112. They also procured leave to file a special brief directed to the federal constitutional question and in this brief specifically called the Supreme Court's attention to *Wisconsin Electric Power Company* v. *City of Milwaukee*, 352 U.S. 948. This case directly ruled on the precise question here presented. This petition was duly considered and denied (R. 75).

The whole case in both the lower court and the Florida Supreme Court turned upon the City's contention that the property owners *were* bound by the administrative proceedings, since the newspaper notices of the adoption of the initiating resolution and the hearing on the confirming resolution were sufficient to bind them.

The property owners' whole contention in the lower and Supreme Courts of Florida was that they were *not*

bound by the proceedings since the newspaper notices were *not* adequate and that there were no benefits flowing from the work.

The constitutional sufficiency of the newspaper notices and the existence of benefits were the only matters in litigation.

The holding by the Florida Supreme Court in its last opinion on the City's Petition for Re-hearing that the property owners were estopped to deny the existence of benefits *necessarily* determined that the newspaper notice afforded them procedural due process.

Therefore, for the City to contend now, as it does here, that these Federal constitutional questions were not decided by the lower court and were not passed upon by the Florida Supreme Court adversely to the Appellants' contention is to assert something which is simply not so.

The Appellee's Motion consists of three paragraphs and the first has several subheadings. The Appellee alleges in the first paragraph of its Motion that Appellants' Jurisdictional Statement fails to comply with Supreme Court Rule 15. While the Jurisdictional Statement meticulously tracks Rule 15, the Appellants will answer each sub-paragraph, and in so doing will follow the same letter designations employed by Appellee. Appellee's contention appears on the left half of the page and Appellants' Reply on the right.

1. Statement fails to set forth:

(a) Copies of the final decree of the trial court, the Circuit Court of Dade County, Florida, which were reversed by opinions and judgments

(a) Reply: There is no such requirement. The Final Decrees of the trial court were in favor of Appellants. The Appellants seek review of the opin-

of the Florida Supreme Court.

ion and judgment of the State Supreme Court which reversed the Final Decrees of the Circuit Court. The Appendix to the Jurisdictional Statement includes the opinions and judgments of the Supreme Court of Florida, of which review is sought as required by Supreme Court Rule 15 (a) and (h).

(b) Any statement showing that there was drawn in question the validity of a Florida Statute on the ground of its being repugnant to the constitution, treaties or laws of the United States.

(b) Reply: The Statement directly alleges (p. 3) that definite. specified sections of Chapter 10-847, Laws of Florida. 1925, are involved. These are the parts of the city charter—a state statute —which prescribed the manner and form of notice which the Supreme Court held to be valid. The Jurisdictional Statement specifies that the appeal is taken pursuant to Title 28, Section 1257 (2), and lists the cases relied upon, and the question presented (p. 3) as required by Supreme Court Rule 15

(b). It also recites that the complaint charged that the assessments were void as being in contravention of the Federal Constitution (p. 8).

(c) The manner in which the questions presented by said Appellants, were brought before the trial and appellate courts.

(c) Reply: Supreme Court Rule 15 contains no such requirement but if it did, the Jurisdictional Statement recites that the Complaints alleged that the liens imposed "constituted a taking in violation of the Constitution of the United States" (p. 8). Also that the Federal questions were specifically briefed for the Supreme Court of Florida (p. 13). The Circuit Court of Dade County (p. 8) directly held as follows: "The notice of hearing of objections to the imposition of the assessments hereinabove referred to was insufficient as a matter of law * * *. The notice was also insufficient because it was inserted in the classified

section of the Miami Herald and in such a manner that it cannot be said that any reasonable person was put upon notice by it that their property was going to be subjected to a special assessment."

This finding of the court was assigned as error by the City (R. 25).

(d) Any statement showing when or how the questions sought to be reviewed were raised in the court of first instance or in the appellate court.

(d) Reply: The Jurisdictional Statement shows that the complaint alleged that the notice under the administrative proceeding was insufficient, that no benefits were derived and that the City's action in imposing the liens constituted a taking in violation of the Constitution of the United States (R 6). The Appellants raised a federal constitutional question in their petition for rehearing which was addressed to the opinion reversing the decree. Prior to that time the Supreme Court had affirmed the decree

	of the lower court on non - federal grounds. When the City's petition for re-hearing was granted, the Appellants filed a brief in the Supreme Court directly calling that Court's attention to the decisions in the Walker and Mullane cases cited in our Statement. The Appellants continuously harped on the contention that the notice was insufficient and that no benefits were received
(e) Any statement showing how the questions sought to be reviewed were passed on by the court of first instance or the appellate court.	(e) Reply: The lower court decreed that the notice published in the Classified Section of the Miami Herald was "insufficient" (R. 21). The Supreme Court of Florida recited this finding of the lower court and simply held the notice to be sufficient (Appendix 7).

2. Appellee does not here assert that no federal questions were raised in the courts below, it is simply asserted that the "Said federal questions were *not expressly* passed on by the trial or appellate courts". (Emphasis supplied). The quotations made by Appellees from

the Jurisdictional Statement plainly show that the questions were raised in the lower court, but we shall further elaborate on this showing from the Jurisdictional Statement and the record.

The complaints before the trial court alleged (R. 6, 7):

> "The special assessment liens sought to be imposed upon the abutting property owners in Highway Improvement District H-477 are illegal and void and constitute taking of property in violation of the Constitution of the United States and of the State of Florida, upon the following grounds:
>
> * * *
>
> C. The Notice was published in an inconspicuous place upon the classified advertising section of the MIAMI HERALD, a position in which it was least likely to attract attention of persons such as the Plaintiffs and those on whose behalf this suit is brought.
>
> E. The improvements which the City made were of a general and public character, and not for the benefit of the abutting property owners."

The lower court found that the Notice by Publication was insufficient and also that there were no benefits conferred by the resurfacing. On appeal to the Supreme Court, the City in its assignments of error specified the following (R. 25):

> "3. The Chancellor erred in finding that the Notice of Hearing of Objections to the Conformation of the Resolution ordering Highway Improvement District H-477 was insufficient as a matter of law.
>
> "4. The Chancellor erred in finding that the Notice was insufficient because it was inserted in the classified section of the 'Miami Herald'.

"5. The Chancellor erred in finding that any reasonable person was not put upon notice that their property was to be specially assessed."

The Supreme Court of Florida affirmed the decree of the lower court, Thornal, J., specially concurring, upon the ground that the owners had received no special benefit.

The City then filed a petition for rehearing in which it said (R. 45):

"In this connection Justice Thornal overlooked or failed to consider that if, in making special assessments, due notice was accorded the property owners by the City of Miami as required by the Charter as held in the opinion of Justice Thomas, then in that event all provisions of organic law that pertain to due process were complied with."

Justice Thornal agreed that this petition should be granted and the cause was re-heard. On re-hearing Thornal, J., joined with Drew, O'Connell and Hobson, J.J., who had dissented from the majority opinion, and thereby reversed the decree of the circuit court. In reversing the decree the Court (per Drew, J.) said (R. 54):

"Section 56 of the charter of the City of Miami provides in detail the steps to be taken by the City officials in authorizing public improvements, the cost of which are to be paid in whole or in part by the owners of the land abutting said improvements and especially benefited thereby. The various notices required to be published are for the purpose of advising the property owners affected of the nature and extent of the improvements, the extent of the assessments to be made against the land to be especially benefited thereby and the details of such construction so that the affected property owners may be fully advised as to what is contemplated, the approximate cost of the improvement and the approximate amount to be ultimately assessed against the affected property. * * *

The failure of the property owners here to promptly assert whatever rights they had or make any effort to comply with the applicable provisions of the city charter now estops them from questioning the validity or amount of these assessments."

The property owners filed a petition for re-hearing in which they said (R. 68):

> "4. In holding the notice of the confirmation of the assessment roll sufficient, and that the appellees were estopped to challenge the lack of benefits because they failed to object pursuant to the notice, the Court overlooked, or failed to consider that the procedure for the imposition of assessment liens is quasi judicial and that the requirements of procedural due process guaranteed by Amd. XIV, U.S. Const., must be complied with. In the case of residents, constructive notice, as attempted, is violative of the rights secured by such amendment."
>
> *Walker* v. *City of Hutchinson*, 77 S. Ct. 200.
>
> *Mullane* v. *Central Hanover Bank & Trust Co. et al.*, 339 U.S. 306."

Although the Appellant property owners had filed a brief on the City's petition for re-hearing, in which the Court's attention was called to the *Walker* and *Mullane* cases, *supra*, nevertheless before the petition for re-hearing was disposed of, they applied to the Court for permission to file a special brief, a procedure which was not sanctioned by the rules.

The order recited (R. 73):

> "On application of attorney for appellees in the above named consolidated causes, it is ordered that said attorney be and he is hereby allowed until February 13, 1958, to file brief in this cause confined solely to the federal constitutional question presented by the petition for rehearing."

To admit that the Florida Supreme Court allowed a brief to be filed on a petition for rehearing, although the rule made no provision therefor and to admit that the Court considered the petition for rehearing, as it said it did, and then to argue that the Court did not pass on the question presented by the petition and the brief, is to attribute to that Court a high degree of indifference.

The Appellants raised the federal constitutional questions in their pleadings in the lower court and in the Supreme Court of Florida. This was all that was necessary.

In *Bellingham Bay & B. C. R. Co.* v. *City of New Whatcom*, 172 U.S. 314, the City ordered certain improvements to be made upon a town's street. Later an assessment was levied upon the abutting property. Suits were brought against various defendants owning lots abutting on the street for the purpose of obtaining decrees foreclosing the liens created by the assessments. The Court said:

> "By its answer, the defendant raised a federal question, inasmuch as it alleged that the notice of the reassessment was insufficient, and specifically that by reason thereof its property was sought to be taken without due process of law, and in conflict with the terms of the 14th Amendment to the Constitution. This Court therefore has jurisdiction of the case."

The suggestion that the Florida Supreme Court did not pass upon the federal constitutional questions raised by the petition for re-hearing is wholly without foundation. The order on the petition for re-hearing recited (R. 75) that a petition for re-hearing had been filed "and the same having been duly considered, etc." was denied. In so doing, it *necessarily* decided that the Appellants' contention was incorrect and that the notice was sufficient under the federal constitution. In *Meyer* v. *City of Richmond*, 172 U.S. 82, the jurisdiction of this Court was challenged on

the ground that the federal question was not raised in the court below. The question involved was not raised in the declaration, but it was subsequently raised, which this Court said was sufficient. In his petition to the Court of Appeals, the plaintiff set up a right under the Federal Constitution. In holding that this was sufficient to present a federal question this Court said:

> "Necessarily, therefore, the Supreme Court of Appeals did as the Court of the City of Richmond did, * * * considered the right which the plaintiff claimed under the Constitution of the United States, and denied the right. Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 288, 17 S. Ct. 581.
>
> * * *
>
> So far the contention of the power of review by this Court existed. A right under the Constitution of the United States was specially set up, and the right was denied. * * *
>
> 'This Court therefore has jurisdiction, and we proceed to the consideration of the merits.' "

In *Arrowsmith* v. *Harmoning*, 118 U.S. 194, the appellant, by an assignment of error, asserted for the first time that his constitutional rights had been invaded. The Court said that it was not easy to see upon what ground the assertion was made that rights under the federal constitution had been denied. Nevertheless it took jurisdiction of the case saying:

> "It was for this reason, perhaps that the Supreme Court, while affirming the judgment of the District Court, took no notice of this assignment of error in its opinion. The decision, however, necessarily involved a denial of the right which was claimed in this way, and thus we probably have technical jurisdiction. For this reason the motion to dismiss must be denied. * * *"

There were no other attacks made on the assessment than the insufficiency of the notice and the want of benefits both of which raised federal constitutional questions. The petition for re-hearing is a bristling indictment of the Florida Supreme Court's opinion holding that the Appellants were bound by the administrative proceedings. There is no other question involved.

The fact that the federal question was necessarily passed upon by the Supreme Court of Florida is evidenced by the fact that Justices Thomas, Roberts and Hobson voted to grant the property owners petition for re-hearing. Justice Hobson had, prior to this time, sided with the majority of the Court in holding that the notice was sufficient. His switch to the Appellants' side of the case was plainly the result of a consideration of the Appellants' petition for rehearing in the Supreme Court of Florida.

In *Herndon* v. *Georgia*, 295 U.S. 441, this Court declined to take jurisdiction of an appeal from the Supreme Court of Georgia to review a conviction of Herndon of an attempt to incite to insurrection. Between the date of the appellant's conviction and the date of the determination of his motion for a new trial, the Supreme Court of Georgia decided another case involving a construction of the statute under which Herndon was convicted. The Supreme Court held that Herndon had had a clear opportunity to raise the question as to the applicability of the latter decision before his motion for a new trial was ruled on, and that it was therefore too late to raise federal constitutional questions by a petition for re-hearing, and that that court was without jurisdiction for the reason that no federal question was seasonably raised. In dissenting on this point, Cardozo, J. (Brandeis and Stone concurring), said this:

> "* * * The settled doctrine is that when a constitutional privilege or immunity has been denied for the

first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely. Missouri v. Gehner, 281 U.S. 313, 320, 50 S. Ct. 326, 74 L. Ed. 870; Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678, 50 S. Ct. 471, 74 L. Ed. 1107; American Surety Co. v. Baldwin, 287 U.S. 156, 164. 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298; Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 367, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254; Saunders v. Shaw, 244 U.S. 317, 320, 37 S. Ct. 638, 61 L. Ed. 1163. Within that settled doctrine the cause is rightly here."

Presumably the Supreme Court considered the federal questions as they were raised and briefed before the Appellants' Petition for Re-hearing was denied. In *Saunders v. Shaw*, 244 U.S. 317, Holmes, J., held that a writ of error could be maintained to review a final judgment of the State of Louisiana in a drainage assessment case, even where the federal questions were not raised in the State Supreme Court until *after* a Petition for Re-hearing had been denied. In so holding, the Court said:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. * * * It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of

the state by his assignment of errors. We do not see what more he could have done."

3. Appellees here urge that no constitutional question is presented because "none of the said appellate opinions discussed any Constitutional Question". The position is untenable. If discussion by an appellate court in its opinion is a condition precedent to the exercise of this Court's jurisdiction on appeal from such a decision, then the Supreme Courts of the several states may effectively prevent such right by refusing to discuss federal questions when they are raised.

Does the fact that the Supreme Court of Florida did not write an opinion on the petition for rehearing directly passing on the federal constitutional questions make any difference? This Court in *McCullough* v. *Commonwealth of Virginia*, 172 U.S. 102, held exactly to the contrary, saying:

> "Could it be said that the silence of the state court in its opinion change the scope and effect of the decision? In other words, can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a state court to determine our jurisdiction."

If the property owners did not have notice they were not estopped. The Florida Supreme Court held that they were estopped. In so holding it necessarily held that the notices published in the newspaper were sufficient. Thereby it decided a question of due process under the 14th Amendment contrary to *Wisconsin Electric Power Company* v. *City of Milwaukee*, 352 U.S. 948.

The Motion to Dismiss should be denied.

Respectfully submitted,

.....

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I, Thomas H. Anderson, one of the attorneys for the appellants herein, and a member of the Bar of the Supreme Court of the United States, certify that on the ..... day of July, 1958, I served a copy of the foregoing Appellants' Reply Brief on the City of Miami by mailing a copy in a duly addressed envelope with sufficient postage prepaid to carry the said Reply Brief to William L. Pallot, the City Attorney for the City of Miami, 65 S. W. 1st Street, Miami, Florida.

.....,

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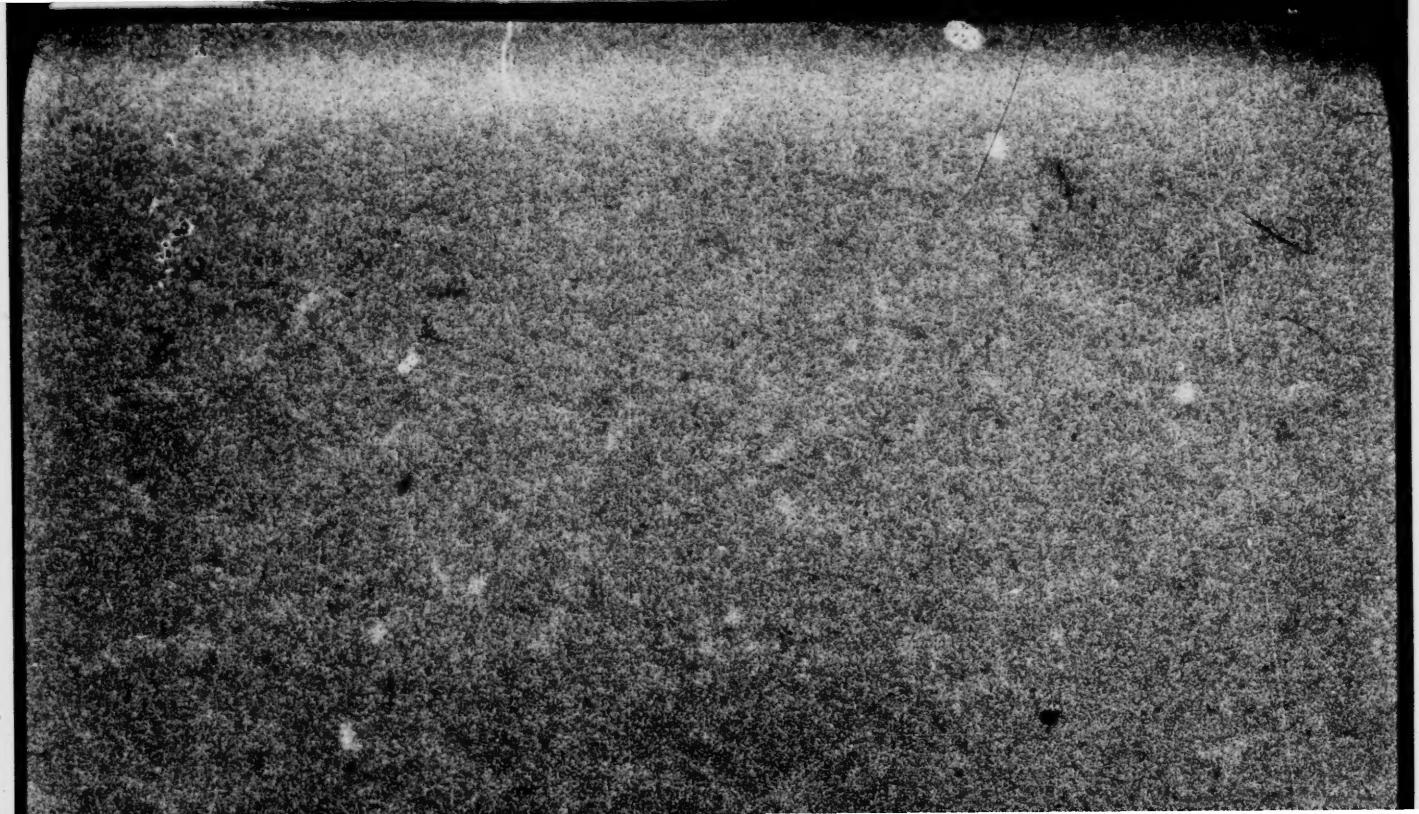

DEC 31 1958
JAMES R. BROWNING, Cl

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 153.

NORTON R. GANGER, L. C. BETHART, THOMAS B. HAMILTON ET AL., APPELLANTS,

VS.

CITY OF MIAMI, A MUNICIPAL CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF OF APPELLANTS.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 153.

NORTON R. GANGER, L. C. BETHART, THOMAS B. HAMILTON ET AL., APPELLANTS,

VS.

CITY OF MIAMI, A MUNICIPAL CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF OF APPELLANTS.

(a) OPINIONS OF COURT BELOW.

The opinions of the Supreme Court of Florida in these causes are reported in 101 So. 2d* 116 and 123. Copies of these opinions appear in the record at Pages 32 *et seq.*

*This volume does not contain the original opinion which is included in the record at page 32.

(b) JURISDICTION OF THE SUPREME COURT.

Appellants brought suits against the City of Miami to enjoin the enforcement of certain special assessment liens imposed on plaintiffs' properties pursuant to Sec. 56 of Chapter 10847, Laws of Florida, 1925, as amended, being the statutory charter of the City of Miami, and to have such liens declared to be unconstitutional and void. The suits were filed in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, where the properties lie and the City of Miami is situated. The decision of the Circuit Court was that the assessments were void because they were not supported by benefits and because the notice of the proceedings in which the assessments were imposed was constitutionally insufficient. The Supreme Court of Florida at first affirmed the decree of the Circuit Court on non-Federal grounds. A rehearing, however, was granted, upon which the Court, three Justices dissenting, reversed the decree. The latter decision held that the question of benefits was conclusively determined by the administrative proceedings based upon notice by publication, which the Court held to be sufficient. A petition for a second rehearing was timely filed by the appellants. This petition called the attention of the Supreme Court of Florida to the applicable and controlling decisions of this Court as to the sufficiency of notices by publication directed to resident property owners. This petition was denied on April 2, 1958.

Notices of appeal to the Supreme Court of the United States were duly filed in the Supreme Court of Florida on June 2, 1958 (R. 73, 76).

The jurisdiction of the Supreme Court to review such a decision by direct appeal is conferred by Title 28, United

States Code, Section 1257 (2). In the following cases, the Court has taken such jurisdiction on direct appeal:

Mullane v. *Central Hanover Bank & Trust Company*, 339 U. S. 306.

New York v. *New York, N. H. & H. R. Co.*, 344 U. S. 293.

Covey v. *Town of Somers*, 351 U. S. 141.

Walker v. *City of Hutchinson*, 352 U. S. 112.

Wisconsin Electric Power Company v. *City of Milwaukee*, 352 U. S. 948.

Lambert v. *The People of the State of California*, 355 U. S. 225.

(c) CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The case involves Sec. 1 of Amendment XIV to the Constitution of the United States, which prohibits the deprivation of property without due process of law, and the denial of equal protection of the laws and Sec. 56 (A), Class 1, (C), (E), (F), (H), (J) (n), (L), (M), (N) and (O) of Chapter 10847, Laws of Florida, 1925, as amended, being the statutory charter of the City of Miami. The case also involves resolutions of the City Commission which were adopted pursuant to these statutory requirements. The charter requirements, the resolutions and the notices are too long to be quoted here. They are included in the appendix.

(d) QUESTIONS PRESENTED.

1. Is a resident property owner estopped to contest a special assessment lien for street resurfacing and to show that he was not specially benefited by such work because

he failed to file objections to the assessment in the administrative proceedings since it affirmatively appears: 1) that the attack on the assessment was by a plenary chancery suit authorized by state statute and prior decisions of the State Supreme Court; 2) that the suit was instituted as soon as the existence of the lien was discovered and within sixty (60) days of the final administrative action; 3) that in such suit the Court found that the assessment was void because the resurfacing bestowed no benefit on the assessed property; 4) that the owner had no actual notice of the proceedings and the only one which the municipality attempted to give was by publication in the classified advertising section of a large metropolitan newspaper; and 5) that the owner's name, address and interest in the property was known to and in the possession of the municipality, which actually sent him a bill for the assessment as soon as the administrative proceedings were concluded?

2. If a Florida statute requires abutting property owners in a particular municipality to file suit in the Circuit Court of Dade County within ten (10) days after confirmation of the special assessment roll, and the resident property owners had no notice of any of the proceedings in which the assessments were levied other than one published in the classified section of a local metropolitan newspaper, is such a limitation upon the right of abutting property owners to resort to the Court violative of the due process and equal protection clauses of the Federal Constitution?

(e) STATEMENT OF CASE.

To repair the damage caused by the wear and tear of traffic, the City of Miami resurfaced a number of its heavily traveled streets, which had originally been paid for

at the expense of the abutting owners, and again charged the cost against the abutting property. Claiming that the resulting improvement was of no special benefit to the assessed property, but that the benefit, if any, was to the general public, certain *resident property owners** including the named appellants Ganger and Hamilton filed complaints in two class actions in the Circuit Court of Dade County, praying that the assessments be declared void and enjoining their collection. The gravamen of the complaints was that the work did not benefit the property, that the assessments were imposed without notice and that the resulting liens constituted a taking in violation of the Constitution of the United States (R. 1).

It affirmatively appeared from the complaints that the only notices as to the proceedings which terminated by the imposition of liens were published in the local newspapers (R. 3).

The Circuit Courts of Florida have jurisdiction under Article V, Florida Constitution, over cases involving the legality of any tax, assessment or toll. An implementing general statute (Fla. Stat. 196.01) confers upon Courts of Chancery in Florida jurisdiction in all cases involving the legality of any assessment and *requires* that in such cases the Court shall inquire into and determine the legality, equality and validity of such assessment under the Constitution and laws of Florida, and shall render decrees setting aside such assessments that appear to be contrary to law.[1]

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*(Excerpts from Assessment Roll Dist. H-477; City's unnumbered Exhibit and City's Exhibit No. 1, Assessment Roll Dist. H-503. R. 78, 80, 100, 102.)

[1]The Statute also requires payment or a tender into Court of the tax due.

The form and manner in which the suits were filed is sanctioned by Equity Rule 3.6 (patterned after old Federal Equity Rule 38), permitting the bringing of class actions, and the procedure followed has been expressly approved by the Florida Supreme Court. *City of Miami Beach* v. *Tenney*, 11 So. 2d 188.

The Appellee moved to dismiss the complaint in the Hamilton suit. The motion was denied and the City appealed. The Supreme Court by a majority decision affirmed the decree, thereby sustaining the sufficiency of the complaint. *City of Miami* v. *Hamilton*, 73 So. 2d 715.

In the answer which was filed after the remand of the cause the City asserted, among other grounds of defense, that the plaintiffs were estopped to contest the validity of the assessment proceedings. This estoppel rested upon the contention that the city had determined that the property had been benefited to the extent of the assessment, and had confirmed the assessment roll and that the resulting liens were incontestably valid because the plaintiffs had not filed objections to such assessments with the City Commission within the time required by the notice by publication above referred to. It was also asserted that the property owners had likewise failed to file a proceeding in the Circuit Court of Dade County, Florida, as required by the City Charter, Ch. 10847, Laws of Florida 1925, within ten (10) days after the Commission had confirmed the assessment roll. It was therefore alleged that the administrative proceedings were conclusive and that the plaintiffs had no right to object thereto (R. 13).

The Hamilton and Ganger suits were thereupon consolidated for trial and, upon evidence taken, the Circuit Court found that the determination of benefits by the City Commission rested upon the publication of notices in the

local newspaper, and that such notices were insufficient as a matter of law. The Court also found that no special benefits resulted from the alleged improvement and that the property owners were not estopped to show this fact by reason of the determination based upon constructive service. Final decrees were entered for the plaintiffs in both suits.[2] (R. 22, 27).

---

[2](R. 27) The decree in the Hamilton suit recited in part that:

"1. On November 19, 1952, the defendant City enacted Resolution No. 25006, in which it created Highway Improvement District No. H-503, comprised of the following street or thoroughfare in the City of Miami, Florida, namely (Describing property):

2. Thereafter, the City caused to be published in the classified section of The Miam Herald a notice requiring all interested persons to take notice that a meeting of the City Commission at 9:30 o'clock A. M., on December 3, 1952, would be held, at which objections would be heard to the confirmation of such resolution.

3. Thereafter, the defendant City resurfaced the street comprising said Improvement District No. H-503 by applying a 1/2-inch leveler course and a 1-inch surface course to the existing pavement. The base and the existing surface were in no wise disturbed. The existing curbings and gutters were in no wise altered.

4. The City imposed the cost of the resurfacing upon the abutting owners, with the exception of the intersections, which was paid for by the City.

5. The notice of the hearing of objections to the imposition of the assessment hereinabove referred to was insufficient as a matter of law in that it specified no place where the objections would be heard, and there was no designation in the notice of what City Commission was to hear objections, no designation of the city in which the street was located, or of what city the person filing the notice was Clerk. The notice was also insufficient because it was inserted in the classified section of The Miami Herald and in such a manner that it cannot be said that any reasonable person was put upon notice by it that their property was going to be subjected to a special assessment.

6. The resurfacing was necessary to keep the street in repair and facilitate the flow of traffic. The work was for the benefit of the general public, and the abutting owners received no special benefit.

The City appealed from the decrees in both suits to the Florida Supreme Court. That Court affirmed both decrees, three Justices dissenting (R. 32). In the majority opinion, the Court held that the assessments were invalid because the City had no power under its Charter to assess for resurfacing as distinguished from repaving. The Court considered that resurfacing was similar to repairing while repaving was much like reconstruction. On the federal ground as to lack of due process, the Court found against the contention of the property owners, saying (R. 32):

> "The Judge decided that the notice was insufficient and that the appellant lacked the authority to impose the cost of an improvement of this nature upon the property owners."

As to this the Court held (R. 35):

> "On the matter of the validity of the notice we must disagree with the chancellor, and by disagreeing, we cannot adopt the view that the property owners could ignore the notice and at this late date[3] successfully attack the action of the city, on the ground that due process had not been afforded them."

On rehearing, a majority of the Court reversed the decree. In so doing, the Court held that the notice by publication to resident property owners was sufficient as a matter of law. It concluded from this that the determination of benefits in the administrative proceedings based upon such notice was conclusive on the property owners and that they were estopped by such determination to contest the want of benefits.

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7. The cost of the resurfacing was paid for with funds from a surplus in the general fund accumulated over the course of years."

[3]The first suit was filed within 48 days after the date of confirmation.

This decision marked the first time that an opinion adverse to the property owners was rendered by the Supreme Court of Florida. It was, therefore, the first time that these Appellants had an opportunity or a right to complain of that Court's opinion with respect to the sufficiency of the notice under the due process clause.

The property owners filed a petition for rehearing, challenging the legality of this holding upon the grounds that it was contrary to decisions of the Supreme Court of the United States, with respect to the sufficiency of notices by publication on residents. The petition charged (R. 65):

> "4. In holding the notice of the confirmation of the assessment roll sufficient, and that the appellees were estopped to challenge the lack of benefits because they failed to object pursuant to the notice, the Court overlooked, or failed to consider that the procedure for the imposition of assessment liens is quasi judicial and that the requirements of procedural due process guaranteed by Amd. XIV, U. S. Const., must be complied with. In the case of residents, constructive notice, as attempted is violative of the rights secured by such amendment.
>
> *Walker* v. *City of Hutchinson*, 77 S. Ct. 200.
>
> *Mullane* v. *Central Hanover Bank & Trust Co. et al.*, 339 U. S. 306."

The petition for rehearing was denied, and these appeals followed.

The Appellee's motion to dismiss these appeals, or affirm on the ground that no substantial Federal question was presented to, or decided in, the State Supreme Court was deferred until the hearing on the merits. That Order provided as follows (R. 104):

> "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the

merits. Counsel are directed to discuss the question of whether the constitutional issues were raised and decided below."

(f) SUMMARY OF ARGUMENT.

I.

The Federal question was adequately and timely raised in the *nisi prius* and appellate courts. The former decided the question in favor of the Appellants, and the latter against them.

II.

In order to be valid, special assessments must be supported by special benefits directly conferred upon the properties so assessed.

III.

Resident owners of properties so assessed are not barred from contesting the assessments because of a lack of benefits since the finding of the Commission imposing the assessment that benefits accrued to the properties was not based on evidence and rests only upon a notice published two times in the classified section of a local newspaper.

We will first discuss the question of whether the constitutional issues were raised and decided below.

(g) ARGUMENT.

I.

Issues in the State Courts.

The Amended Complaint alleges (R. 6):

> "The special assessment liens sought to be imposed upon the abutting property owners in Highway Improvement District H-477[1] are illegal and void and constitute taking of property in violation of the Constitution of the United States and of the State of Florida, upon the following grounds:
>
> The Notice was published in an inconspicuous place upon the classified advertising section of the MIAMI HERALD, a position in which it was least likely to attract attention of persons such as the plaintiffs and those on whose behalf this suit is brought.
>
> The improvements which the City made were of a general and public character, and not for the benefit of the abutting property owners."

The lower Court found that the Notice by Publication was insufficient and also that the resurfacing conferred no special benefits on the abutting property. On appeal to the Supreme Court, the City in its assignments of error specified the following (R. 26):

> "3. The Chancellor erred in finding that the Notice of Hearing of Objections to the Confirmation of the Resolution ordering Highway Improvement District H-477 was insufficient as a matter of law.

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[1]The City Charter provides for the creation of special assessment districts. To accomplish this, the City lumped together a number of streets which were designated as Highway Improvement Districts H-477 and H-503. H-477 is the district involved in the Hamilton case and H-503 is the one involved in the Ganger case.

4. The Chancellor erred in finding that the Notice was insufficient because it was inserted in the classified section of the 'Miami Herald'.

5. The Chancellor erred in finding that any reasonable person was not put upon notice that their property was to be specially assessed."

The Supreme Court of Florida in its first opinion, which affirmed the lower Court's decree (R. 32), directly passed upon the question of whether the newspaper publication complied with requirements of due process of law. That Court said (R. 35):

> "On the matter of the validity of the notice we must disagree with the Chancellor, and by disagreeing, we cannot adopt the view that the property owners could ignore the notice and at this late date successfully attack the action of the City, on the ground that due process had not been afforded them."

In the original dissenting opinion, the minority said (R. 39):

> "Holding as we do that the original notice* of the intention of the City of Miami to install these improvements and assess a portion of the cost against the abutting property was *valid in all respects*, the failure of the appellees to promptly assert their rights in the premises now estops them from maintaining an action, the ultimate objective of which is to declare the assessments invalid. It was the duty of the appellees to promptly assert their position when the City obtained jurisdiction of the improvement by virtue of the passage of the initial resolution and the giving of what we hold to be a valid and legal notice."

Justice Thornal, in a specially concurring opinion, said (R. 37):

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*Emphasis herein supplied unless otherwise noted.

"Here the trial judge specifically found that 'the work was for the benefit of the general public, and the abutting owners received no special benefit'. The record abounds in evidence more than adequate to sustain this conclusion.

For the foregoing reasons and the reasons announced by Mr. Justice Thomas on the other points, I would affirm the decree."

On petition for rehearing granted, the dissenters, joined by Justice Thornal, became the majority and overruled the original opinion which was in favor of the property owners. In so holding, the Court again considered the sufficiency of the notice, saying (R. 50):

"Holding then, as we unanimously do, that the *notice* discussed in the opinion by Mr. Justice Thomas was in all respects regular and in full compliance with the provision of the City Charter relating to special assessments for benefits, * * *"

A petition for rehearing—timely filed and adequately briefed—reasserted the property owners' contention that the proceedings were void for want of notice under the due process clause (R. 63).

Frequent decisions of the Supreme Court of the United States recognize its right to consider a case arising from a situation so presented.

In *Wilson* v. *The Black Bird Creek Marsh Company*, 2 Pet. 245, 250, Chief Justice Marshall said:

"The defendants in error deny the jurisdiction of this Court, because, they say, the record does not show that the constitutionality of the Act of the Legislature under which the plaintiff claimed to support his action, was drawn into question.

* * *

> * * * But we think it impossible to doubt that the constitutionality of the Act was the question, and the only question which could have been discussed in the State Court. That question must have been discussed and decided.
>
> * * *
>
> * * * This plea draws nothing into question but the validity of the Act; and the judgment of the Court must have been in favor of its validity. Its consistency with, or repugnancy to the Constitution of the United States, necessarily arises upon these pleadings, and must have been determined. This Court has repeatedly decided in favor of its jurisdiction in such a case. Martin v. Hunter's Lessee, 1 Wheaton 355; Miller v. Nicholls, 4 Wheaton 311; and Williams v. Norris, 12 Wheaton 117, are expressly in point. They establish, as far as precedents can establish anything, that it is not necessary to state in terms on the record that the Constitution or law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th Section of the Judicial Act, if the record shows that the Constitution or a law or a treaty of the United States must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favor of the party claiming under such law."

In *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574. 579, the Court said:

> "The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes, upon the authority of which alone the auditor of state pro-

ceeded, are repugnant to the national Constitution, that judgment could not properly have been rendered."

In *Eureka Lake & Yuba Canal Co.* v. *Superior Court*, 116 U. S. 410, 415, the Court said:

> "It does not appear affirmatively on the face of the record that the orders of the Superior Court were objected to in the Supreme Court on the ground that, in the absence of personal service of the order to show cause on some officer or authorized agent of the corporation, the judgment in the contempt proceeding was without due process of law, and therefore contrary to the fourteenth amendment of the Constitution of the United States; yet that point is made here, and it is possible its decision was necessarily involved in the final order that was made. For this reason the motion to dismiss is overruled: * * *"

In *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 195, the appellant, by an assignment of error, asserted for the first time that his constitutional rights had been invaded. The Court said that it was not easy to see upon what ground the assertion was made that rights under the Federal Constitution had been denied. Nevertheless it took jurisdiction of the case, saying:

> "It was for this reason, perhaps, that the Supreme Court, while affirming the judgment of the District Court, took no notice of this assignment of error in its opinion. The decision, however, necessarily involved a denial of the right which was claimed in this way, and thus we probably have technical jurisdiction. For that reason the motion to dismiss must be denied. * * *."

In *Kaukauna Water-Power Co.* v. *Green Bay & M. Canal Co.*, 142 U. S. 255, 269, the constitutional inhibition relied upon was not distinctly put at issue by the pleadings

or passed upon in the opinion of the Supreme Court of Wisconsin. In taking jurisdiction, this Court said:

> "* * * This Court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were *necessarily* involved in the disposition of the case by the state court. Wilson v. Marsh Co., 2 Pet. 245; Armstrong v. Treasurer, 16 Pet. 281; Insurance Co. v. Needles, 113 U. S. 574; 5 Sup. Ct. Rep. 681; Canal Co. v. Superior Court, 116 U. S. 410, 6 Sup. Ct. Rep. 429."

In *McCullough* v. *Commonwealth of Virginia*, 172 U. S. 102, 117, this Court held that a state court could not prevent review by failing expressly to pass upon a Federal question. It said.

> "* * * Could it be said that the silence of the state court in its opinion charged the scope and effect of the decision? In other words, can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdiction of this Court to review its judgment? Such a construction would always place it in the power of a state court to determine our jurisdiction."

In *State of Minnesota* v. *National Tea Co.*, 309 U. S. 551, 557, the State of Minnesota brought certiorari to review a decision of the Supreme Court of that State. It was urged by the respondent that the petition should be dismissed upon the ground that when the state court decision rests on two grounds, one involving a federal question, and the other a non-federal question, this court would not take jurisdiction. In denying the motion of the respondent and vacating the judgment and remanding the cause, the Supreme Court said:

> "Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and

ambiguities from the opinion in such cases. Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important Federal issues, such as have been argued here, will reach this Court for adjudication; that state Courts will not be the final arbiters of important issues under the Federal Constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state Courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions."

The trial court expressly held that the assessments were not supported by benefits and that the newspaper notice did not estop the property owners from asserting this fact.

The Florida Supreme Court first held that the notice was sufficient, but that the City lacked authority to assess for resurfacing. It concluded that the liens were void on a non-federal ground. On rehearing, the Court expressly held that the notice was sufficient and *for that reason* the property owners could not assert a lack of benefits. Thus legislative action was deemed consistent with due process. *Carlson* v. *California*, 310 U. S. 106.

This Court has repeatedly held that where a constitutional privilege has been denied for the first time by a ruling made on an appeal, a litigant thus surprised may timely raise the constitutional question on petition for rehearing.

Saunders v. *Shaw*, 244 U. S. 317.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673.

State of Missouri ex rel. Missouri Ins. Co. v. *Gehner, Assessor*, 281 U. S. 313.

Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 156.

In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 677, the Trust Company brought a suit against the County Treasurer to enjoin him from collecting taxes assessed against shares of stock. It was alleged that the assessment was void and discriminatory and violated the Fourteenth Amendment of the Federal Constitution. The defendant's answer denied all the allegations of discrimination, and alleged as an affirmative defense that the plaintiff had not pursued its administrative remedies before the State Board of Equalization, and was therefore guilty of laches. The trial court refused the injunction and dismissed the bill without opinion or findings. The Supreme Court of Missouri affirmed because, since plaintiff had not complained to the tax commission, "it was clearly guilty of laches in not so doing." In so holding, the Court overruled an earlier decision to the effect that the administrative body was without authority to grant such relief. The court reversed the judgment of the Supreme Court of Missouri, saying:

> "The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of article 4 of Chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the commission, the court transgressed the due process clause of the Fourteenth Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity."

The Supreme Court of Florida necessarily upheld the constitutionality of the Charter requirements with respect to the sufficiency of the notice. The binding effect of the administrative proceeding rested upon the sufficiency of the notice and the sufficiency of the notice depended upon its compliance with controlling provisions of the XIV Amendment. Assessments which are not based on notice are void, and void assessments raise no estoppel. *Gulf View Apartments, Inc.*, v. *City of Venice*, 108 Fla. 41, 145 So. 802. To say, therefore, that the Court did not necessarily decide that the notice measured up to constitutional standards is not correct.

Support, however, for our position does not rest upon implication alone. As we have pointed out (9, 10) the Court held that the notice was "valid in all respects".

Plainer or more direct language could hardly have been employed. Thus the Court both expressly and by necessary implication has ruled upon the federal constitutional question that was raised by the complaint in the Circuit Court and raised by the City's assignment of errors in the Supreme Court.

The property owners have vigorously and stubbornly asserted their rights under the Federal Constitution throughout these long and bitterly contested proceedings. The contention that the case was decided on other grounds is wanting both in fact and candor.

II.

The Assessments Were Not Supported by Benefits.

The general rule is that property not specially benefited by improvements cannot be specially assessed therefor. The Florida Supreme Court has so held many

times. In *Stockman* v. *City of Trenton*, 132 Fla. 406, 181 So. 383, the Court said:

> "The Courts of this country are committed to the doctrine that special assessments should in no case exceed the benefits they confer to the property improved and that if the governmental entity imposes an assessment in excess of benefits, it will be held to the extent of the excess as the taking of property without due process of law. Atlantic Coast Line Railroad Company v. Lakeland, 94 Fla. 347, 115 So. 669; Abell v. Town of Boynton, 95 Fla. 984, 117 So. 507; Atlantic Coast Railroad Company v. City of Winter Haven, 114 Fla. xxv, 151 So. 321; McQuillin on Municipal Corporations, Vol. 5, 2240, 2d Ed."

In *Utley* v. *City of St. Petersburg*, 107 Fla. 6, 114 So. 58, the Court said:

> "This court has repeatedly held that special assessments for public improvements can only be justified upon the theory of special benefits accruing to the property assessed and an assessment not based upon this principle violates the organic law prohibiting the taking of private property for the public benefit without compensation."

The Court went even further. In the cited case the Legislature had attempted by special act to validate the municipal assessment. This act was held to be invalid, the Court saying:

> "It is the well-settled rule that a tax levy which could not have legally been made in the instance without violating organic law cannot generally be ratified, and that when resulting in a violation of substantial property rights a void tax levy cannot be legalized. See New Smyrna Inlet District v. Esch, (Fla.) 137 So. 1, and cases there cited; also, Tax Securities Corporation v. Borland, (Fla.) 137 So. 151.

In view of the above stated rule, it becomes unnecessary for us to discuss further the effect of chapter 15511, Sp. Acts 1931, as to this assessment. The assessment was void because of its arbitrary discrimination as above mentioned and violated the provisions of the organic law guaranteeing equal protection to all."

Lower Federal Courts have said the same thing. In *Atchison, T. & S. F. Ry. Co.* v. *City of San Diego et al.*, (D. C. Cal.) 34 F. 2d 293, 294, the Court said:

> "An assessment of the kind here to be considered will be deemed arbitrary and illegal, if, upon examination of the record of proceedings had, together with other evidence offered to show fully plain conditions which the assessing officers are presumed to have had before them, the conclusion is inescapable that the property assessed could not be benefited by the contemplated work, or that, if benefited, the benefit necessarily would be trivial or inconsequential."

The Court of Appeals affirmed the "well considered opinion." 45 F. 2d 11.

In *Lancaster* v. *Police Jury*, (D. C. La.) 254 Fed. 187, 189, Foster, J., said:

> "It is well settled that the Legislature may create taxing districts for the purpose of local improvements, such as roads, and also may delegate that authority to municipal corporations, or boards, or commissions. When this is done, the question of benefit to the land taxed is one of fact, to be finally determined by the taxing authorities, but subject, however, to the exception that the delegated body may not act arbitrarily, and impose a tax in utter disregard to the benefit to be derived by the property taxed."

These cases are in harmony with Federal Supreme Court opinions. See *Myles Salt Co.* v. *Iberia & St. M. Drainage Dist.*, 239 U. S. 478.

Appellees will probably counter with the contention that the City Commission determined that benefits accrued. The determination is void for want of notice, as we will show under Question III. Nonetheless such a finding, unsupported by evidence, is invalid, even if affected parties had had due notice.

In the case at bar, the administrative determination of liability simply recited that (App. 12, R. 92):

> "Whereas, no objections thereto were made by any person interested in, or affected by said assessment roll and the said assessment roll appearing, in all respects, regular and in accordance with the requirements and provisions of the City Charter;"

Such an unsupported declaration constitutes a denial of procedural due process since it is obviously arbitrary and capricious.

Gallegos v. *Nebraska*, 342 U. S. 55.

Cf. Frankfurter, J., in *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.

In *Morgan* v. *U. S.*, 298 U. S. 468, 481, the Court in speaking of the effect of administrative findings held:

> "* * * For the weight ascribed by the law to the finding—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It

is a duty akin to that of a judge. The one who decides must hear."

The Florida Supreme Court is in accord with this opinion. In *Fisher* v. *Board of County Commissioners of Dade County*, Fla., 84 So. 572, the Court said:

> "A 'special benefit assessment' must be levied according to the particular benefits received by the real property in question and in order to sustain the assessment, there must be some proof of the benefits other than the dictum of the governing agency."

In *Atchison, T. & S. F. Ry. Co.* v. *City of San Diego, et al.* (D. C. Cal.) 34 F. 2d 293, the Court said:

> "It is admitted by defendants that the finality which attends the determination of the city council, when it acts upon the protest of a property owner, assumes cases where that body acts within a fair and reasonable discretion upon the matter before it (which is presumed, prima facie), but that the protestant is not concluded if he is able to show that no fair rule of uniformity was adopted in making the assessment (Schaffer v. Smith, 169 Cal. 764, 147 Pac. 976), or that the assessment was made without regard to benefits to accrue to the property taxed (Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 Pac. 217, L. R. A. 1918E, 197)."

The right to inquire into the support for the administrative finding was primarily one for the State Court to exercise. When the attack was made upon the administrative determination by the complaint in the Hamilton case, the Circuit Court held the complaint to be good as against the City's motion to dismiss. The Supreme Court affirmed this action, thereby expressly sanctioning the

challenge to the sufficiency of the administrative proceedings. *City of Miami* v. *Hamilton*, 73 So. 2d 715.[5]

After this early (1954) Supreme Court approval of its action, and in the exercise of its undoubted constitutional and statutory power (Const., Art. V, Sec. 6 (c) and Fla. Stat. 196.01), the Circuit Court assumed jurisdiction of the case (*City of Miami Beach* v. *Tenney*, 152 Fla. 126, 11 So. 2d 188) and inquired into and determined the legality of the assessment. Then pursuant to the statute, it rendered a decree setting aside the assessments as being contrary to law. In so doing, it found and *determined* that the work done was for the benefit of the general public and that the abutting owners received *no special benefit*.

As above pointed out (10), in a specially concurring opinion to the original majority opinion of the Florida Supreme Court, Thornal, J., said that the record *abounded* in evidence *more* than adequate to sustain the trial court's finding that the owners received no special benefit (R. 37).

These findings were not seriously challenged in the Florida Supreme Court by the City and come here with a conclusive presumption of correctness.

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[5]Prior to the last opinion herein, it had been the rule in the Florida Supreme Court that a determination of law on a prior appeal established the law of the case and put it beyond the *power* of the Court to overturn such decision on a subsequent appeal of the same case. *Hamel* v. *Danko*, Fla., 82 So. 2d 321, per Drew, J., the author of the last opinion in *City of Miami* v. *Ganger*, 101 So. 2d 116, which, in effect, overruled *City of Miami* v. *Hamilton*, 73 So. 2d 715.

III.

Resident Owners of Properties So Assessed Are Not Barred from Contesting the Assessments Since Benefits Are Lacking and Since the Administrative Finding Rests upon a Notice Published in the Classified Section of a Local Newspaper.

Any discussion as to the necessity and sufficiency of the notice involved in these cases requires a brief explanation of the working of the City's Charter regarding the making of street improvements and the imposition of special assessment liens to defray the cost thereof.

The legal machinery for accomplishing such objective is contained in Sec. 56 of the Charter and particularly Sub-Sections A, Class 1, C, E, F, H, I, M and N (App. 1 *et seq.*).

Briefly, the procedure is as follows: the City Commission adopts an initiating resolution by which it determines to do certain work. The resolution designates the property against which assessments are to be made, which then comprises a district. Thereupon the city manager prepares and files with the city clerk plans and specifications of the improvement together with an estimate of the cost. When he receives these plans, the clerk publishes one time in a daily newspaper of general circulation a notice stating that, at a meeting of the Commission on a certain day and hour not earlier than ten (10) days from such publication, it will hear the objections of all interested persons to the confirmation of the resolution. If objections are not so made they are to be considered as waived and if made and overruled the confirmation of the resolution shall be the final adjudication of the issues unless proper steps are taken within ten (10) days to secure relief in a court of competent jurisdiction.

Having thus taken these preliminary jurisdictional steps, the Commission proceeds either to let a contract for the work to others or itself to do it with its own employees. In either case a preliminary assessment roll is then prepared which is required to contain, among other matters, a description of the lots and parcels of land within the district and the amount to be assessed against each.

(In the cases at bar these assessment rolls as finally adopted were admitted in evidence as an un-numbered exhibit in the Hamilton case (Dist. H-477) and as Exhibit No. 1 in the Ganger case (Dist. H-503). These original exhibits were forwarded to this court by the Supreme Court of Florida. Excerpts from them, showing the properties of the named plaintiffs together with their names and addresses and the amount of the assessments, are in the printed record at pages 78, 80, 100 and 102.)

When the preliminary assessment roll is filed with the city clerk, he is required to publish a second notice once in each of two successive weeks in a daily newspaper of general circulation in the city, stating in such notice that at a regular meeting of the Commission held on a certain day and hour not less than twelve (12) days from the date of the first publication "all interested persons may appear and file written objections to the confirmation of the" roll.

The Commission has plenary power in this hearing to increase, reduce or cancel the assessments against "any and all" lots according to the special benefits which the Commission decides each lot has or will receive "but (it) *shall not* confirm any assessment in excess of the special benefits to the property assessed, and the assessments confirmed *shall be* in proportion to the special benefits."

The confirmation of the roll by the Commission makes it final and conclusive unless the complaining property

owner, within ten (10) days from the confirmation files a verified petition with the Clerk of the Circuit Court of Dade County setting forth that the assessment is excessive, in which case, and upon compliance with other procedural requirements of the act, the Court is vested with power to set aside assessments against particular lots or against the "entire district".

The Appellants' failure to object and pursue this statutory method for review gave the Florida Supreme Court the excuse for holding that they were estopped to complain. The Appellants' answer to this is that the notices were void, hence the determination of benefits was void. Therefore, they assert, a void act estops nobody.

On March 1, 1950, the Miami City Commission adopted a resolution ordering a local improvement to be made in certain downtown streets, denominated District H-477, by *resurfacing* the existing asphalt concrete pavement with a specified leveler course and wearing surface. Pursuant to the Charter, a notice of local improvement was published one time in the classified advertising section of the Miami Herald.[6] The body of the notice was as follows (R. 3):

> "All interested will take notice that at a meeting of the City Commission at 9:30 o'clock AM March 15, 1950, their objections will be heard to the confirmation of Resolution No. 22277, adopted March 1st, 1950, ordering paving improvements on the following avenues, to-wit:
>
> * * *
>
> Plans, specifications and estimate of cost of said improvement are on file in the City Clerk's office.
>
> F. L. Correll,
> City Clerk."

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[6]This paper is said to carry more advertising in its classified section than any other newspaper in the United States.

The notices in H-503 were identical, except as to streets, avenues, district numbers and dates (App. 8, R. 88).

It will be noted at once that the notice contains several glaring defects: it is indefinite as to the place where the objections would be heard; it is addressed to no one in particular; it does not designate the municipality which is involved in the work; and it gives no information as to the fact that special assessments were to be levied to pay for the improvement.

The rule with respect to the necessity of notice is stated in McQuillin, Mun. Corp. (3rd Ed.), Vol. 14, Sec. 38.98, as follows:

> "Before special assessments can be charged upon the property of private persons, the owners must be given notice thereof, with an opportunity to be heard and to contest, if desired, the validity and fairness of the assessment, otherwise there is a denial of due process of law in contravention of both the state and the federal constitution, and failure to give such notice and hearing, it is usually held, will render an assessment void whether or not notice is expressly required by law, unless, of course, the property owner waives the requirement that notice be given to him."

Decisions of this Court support the text.

Turpin v. *Lemon*, 187 U. S. 51.

Londoner v. *City & County of Denver*, 210 U. S. 373.

The Florida Supreme Court has held that failure to give notice will render the assessment void. *Ft. Myers* v. *State*, 95 Fla. 704, 117 So. 97.

A notice (including, we assume, even a personal one) in order to satisfy the requirements of due process must contain sufficient information as to time and place and must be such as that a person affected may, with reasonable effort, be enabled to attend and present his objections.

In *Bellingham Bay & B. C. R. Co.* v. *City of New Whatcom*, 172 U. S. 314, 319, involving special assessments, the Court said:

> "* * * And the time and place must be such that with reasonable effort he will be enabled to attend and present his objections."

From *City of Norfolk* v. *Young*, 97 Va. 728, 34 S. E. 886, we quote:

> "The notice * * * wholly failed to designate * * * a place where * * * the party to be affected had the right to appear to expose any alleged wrong in the assessment imposed upon him or his property."

In *City of Logansport* v. *Pollard*, 50 Ind. 151, it is said:

> "* * * the notice given * * * did not specify the place of the meeting of the commissioners and it was, therefore, in our opinion, insufficient. * * * These objections are fatal."

Here, however, the only notice which was given was by publication. As to residents this was plainly void.

Such indeed has been the holding of the Supreme Court of Florida. In *Rafkin* v. *City of Miami Beach*, Fla., 38 So. 2d 836, an attack was made upon special assessment proceedings conducted by the City of Miami Beach under a charter which is almost identical with that of the City of Miami. It was contended among other things that the notice of the special assessment proceedings was insufficient because it was published in the classified advertising section of the Miami Herald. In discussing this point the Court said:

> "* * * The notice in question did not meet the requirements contemplated by law, * * * it is so intermingled with other printed matter that one of ordinary

mind would not be put on notice that his rights were in danger."

Indeed, the Florida Court had within its own reports, cases in which pronouncements with respect to notice and due process were as strong in support of the Appellants' position as any in the country. In *Redman* v. *Kyle*, 76 Fla. 79, 80 So. 300, the Court reversed a decree which dismissed a complaint brought to attack the assessments levied by a drainage district upon the ground that the tax was levied without notice. The Court quoted, with approval, from *Londoner* v. *City and County of Denver*, 210 U. S. 373, and concluded its opinion in these words:

> "This fundamental principle assures that no one shall be divested of his property as a result of a suit, either judicial or in its nature judicial, without a fair and full opportunity to contest the claim set up against him, to meet it on the law and facts and show, if he can, that the pretext for making it is unfounded; and the hearing allowed must be such as is practicable and reasonable in the particular case, not merely colorable and illusory. 6 R. C. L. 451. Whatever right to a hearing accorded by the act in question to owners of land upon which the tax under consideration is imposed amounts merely to the shadow and not the substance to the shell, and not the fruit of the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law."

Why the Court, in the face of concurring decisions of this Court, failed to follow its own precedents in the cases at bar, we cannot say.

Such opinions of this Court abundantly sustain our position.

In *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U. S. 306, 315, the Court struck down a New

York Statute which provided for notice by publication against resident parties interested in the settlement of a common trust, consisting of over one hundred (100) separate trusts approximately half of which were *inter vivos* and the remainder testamentary. In an opinion by the late Mr. Justice Jackson, the Court said:

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare Hess v. Pawloski, 274 U. S. 352; 71 L. Ed. 1091, 47 S. Ct. 632, with Wuchter v. Pizzutti, 276 U. S. 13, 72 L. Ed. 446, 48 S. Ct. 259, 57 A. L. R. 1230, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.
>
> It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted on the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence

with actual notice we are unable to regard this as more than a feint.

* * *

We hold the notice of judicial settlement of accounts required by the New York Banking Law, § 100-c (12), is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion."

In *New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293, the City imposed liens on specific parcels of the railroad's real estate for street, sewer and other improvements. Proceedings for the reorganization of the railroad were had in the federal district court. That court issued an order directing creditors to file their claims by a prescribed date. Copies of that order were mailed to creditors who had appeared in court. Other creditors had to depend for their notice on two once-a-week publications of the order in five daily newspapers, one of which was the Wall Street Journal. New York City received no copy of the order and never filed its lien claims. The railroad then sued to have the city's lien claims declared unenforceable. The District Court and Court of Appeals held for the railroad. However, on appeal to the Supreme Court of the United States that holding was reversed. The Court in a unanimous decision said (pp. 296, 297):

"Section 77 (c) (8) of the Act states that 'The judge shall cause reasonable notice of the period in which claims may be filed, * * * by publication or otherwise,' 11 U. S. C. § 205 (c) (8), 11 U. S. C. A. § 205 (c) (8). We hold that publication of the bar order in newspapers cannot be considered 'reasonable notice' to New York under the circumstances of this case.

> Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865. But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication. See, e. g., Standard Oil Co. v. State of New Jersey, 341 U. S. 428, 71 S. Ct. 822, 95 L. Ed. 1078. The case here is different. No such excuse existed to justify subjecting New York's claims to the hazard of forfeiture arising from 'constructive notice' by newspaper. * * *
>
> The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York City has not been accorded that kind of notice."

A similar situation existed in *Walker* v. *City of Hutchinson*, 352 U. S. 112. In this case, the appellee City filed an action to condemn a part of the property of the appellant, Walker. Pursuant to a Kansas statute, three (3) Commissioners were appointed by the Court to determine compensation for the property. A local statute authorized notice to be given either in writing or in one publication in the official city paper. Appellant was not given notice in writing, but the publication was made as required. Damages were fixed and the amount deposited with the City Treasurer.

The statute authorized an appeal from the award of the Commissioners if taken within thirty (30) days after filing of their report. Appellant took no appeal within the prescribed period. Some time later, he brought an equitable action in the Kansas District Court alleging that he had not been notified of the proceedings, knew nothing about them, and charging that the newspaper publication

was not sufficient notice to satisfy the due process clause. In reversing the judgment of the State Supreme Court, this Court in an opinion by Mr. Justice Black cited *Mullane* v. *Central Hanover Bank & Trust Co.*, and said this:

> "Measured by the principles stated in the Mullane case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In Mullane we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value."

More recently this Court noted probable jurisdiction of a case involving the identical question here presented (*Wisconsin Electric Power Company* v. *City of Milwaukee*, 352 U. S. 948). In this case the Power Company brought suit in the Circuit Court for Milwaukee County attacking special assessments imposed upon property of the plaintiff by the City, on the ground that the only notice to the property owner of the imposition of the assessments was by publication in a local newspaper. The Circuit Court dismissed the suit and the Power Company appealed. The decree was affirmed by a divided court. Upon remand the plaintiff obtained leave to file an amended pleading, which was done and the cause was again dismissed. The Power Company again appealed, citing *New York* v. *New York, N. H. & H. R. Co.*, and *Mullane* v. *Central Hanover Bank & Trust Co.* The Court again affirmed the decree and the

Power Company appealed to this Court. This Court noted probable jurisdiction (352 U. S. 949) and remanded the case to the Supreme Court of Wisconsin for further consideration of the Federal question. On reconsideration the Supreme Court of Wisconsin said, 274 Wis. 121, 81 N. W. 2d 298:

> "In view of the determination made by the United States Supreme Court we hold that the constructive notice given by the defendant city by publication of the proposed special assessments against the plaintiff's land did not meet the requirements of due process. Mullane v. Central Hanover B. & T. Co., 1950, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865, and Walker v. City of Hutchinson, 1956, 352 U. S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178. Therefore, it was error for the trial court to have sustained the general demurrer interposed to plaintiff's amended complaint."

More recently still, in *Lambert* v. *People of the State of California*, 355 U. S. 225, this Court said:

> "On the other hand, Due Process places some limits on its exercise. Engrained in our concept of Due Process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, *before assessments are made, before penalties are assessed.* Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865; Covey v. Town of Somers, 351 U. S. 141, 76 S. Ct. 724, 100 L. Ed. 1021; Walker v. City of Hutchinson, 352 U. S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178."

No necessity existed which justified resort to constructive service in the cases at bar. The plaintiffs were resi-

dents and taxpayers of the City. The City had their names and addresses and actually mailed bills to them for the special assessment lien *after* the roll had been confirmed. This was the first time that actual notice was given to them of the special assessments. They promptly brought suit, and have diligently prosecuted the litigation ever since.

The possession by the bank of the names and addresses of the affected parties influenced the Court in the *Mullane* case, in it was held (339 U. S. 306, 318):

> "* * * Where the name and post office addresses of those affected by a proceeding are at hand, *the reasons disappear* for resort to means less likely than the mails to apprise them of its pendency."

and further (319):

> "* * * Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan."

The Florida Supreme Court's position that the property owners had failed to resort to the statutory method for review and hence were estopped to raise the question of benefits in a later plenary suit cannot be defended. This is so for these reasons:

1) If the administrative proceedings were void for lack of notice—as they were—they were subject to attack at any time. The Florida Supreme Court has so held. *Harvey* v. *City of St. Petersburg*, 138 Fla. 597, 189 So. 861; *Gulf View Apartments, Inc.*, v. *City of Venice*, 108 Fla. 41, 145 So. 842, and cf. *Milwaukee Electric Ry. & Light Co.* v. *Village of Shorewood*, (Wis.) 193 N. W. 94. This case held that an action to avoid a special assessment not

brought within the time prescribed by statute was nevertheless maintainable since the assessment was invalid because not based on benefits. This point was also directly ruled upon in the first majority opinion of the Supreme Court of Florida (R. 36) in which the Court (Thomas, J.) said:

> "The City had no inherent right to levy special assessments; such power could have been invested in it only by the legislature. City of Coral Gables v. Coral Gables, Inc., 119 Fla. 30, 160 So. 476. The power to assess for what was obviously repairs was lacking. The assessments were, therefore, void. The payment of assessments by some of the (fol. 38) owners would not operate as an estoppel because that doctrine is inapplicable when an assessment is void. Gulf View Apartments, Inc., et al. v. City of Venice, 108 Fla. 41, 145 So. 842. The appellees were entitled to the relief they sought and were granted."

2) The Charter (Section 56, (N)) provided a method for judicial review if invoked within ten (10) days from the confirmation of the assessment roll (App. 5). Having had no notice as to the hearing in which this resolution was entered the property owners likewise had no knowledge as to the entry of the confirming resolution. This was the act which set the statutory review period running. One may not be precluded from asserting his rights to attack an administrative order when he had no knowledge of the entry of such order;

Failure to resort to Court action for relief from an administrative judgment within a period prescribed by the administrative procedure presented no obstacle to the Court in affording the property owners relief in *Walker* v. *City of Hutchinson*, 352 U. S. 112.

3) The limitation on the time for review is itself so short (10 days) as almost to preclude the examination of the proceedings and the preparation of adequate pleadings.

In *Hayes* v. *Douglas County*, 92 Wis. 429, 65 N. W. 482, the headnote states:

> "A statute preventing a property owner from contesting the validity of an assessment for a public improvement after the expiration of forty days after proceedings therefor were commenced, based on constructive notice, is unconstitutional."

and in the opinion the Court holds:

> "While it is, no doubt, convenient and desirable, on the part of the municipality, that all questions in respect to the validity of such proceedings shall be put at rest as soon as may be, still there is no such exigency as to justify even an apparently unfair abbreviation of the rights of property owners or undue advantage taken. The time allowed should be ample to afford a reasonable probability that he would become informed of the proceedings against his property, and be fairly able to assert his right, before it is finally barred. It is considered that, plainly, this statute does not afford such reasonable opportunity, and cannot be sustained as a valid limitation. A short statute of limitation is not an allowable substitute for due process of law. It is utterly subversive of that constitutional protection to private rights of property. The fact that such short limitations have been sustained by some courts does not persuade the court that they are just and supportable on principle."

More to the point is the fact that the right of review is required to be exercised within ten days from the date of the confirmation of the assessment roll, yet no provision is made for notifying affected persons as to the time when this act was done. In the Hamilton case the assess-

ment roll was not confirmed on the return day of the newspaper notice but several days later. Yet this fact, on which a right to judicial relief is claimed to depend, was never communicated to the property owners.

In the light of these facts to hold that Appellants are estopped to complain is resort to sterile formalism. The city charter itself gave complaining property owners a right to resort to the courts for relief within ten days after the entry of the confirming resolution and this without having previously objected to the proceedings. In the Hamilton case, the property owners brought suit within forty-eight days from the date of confirmation, and the suitors in Ganger's case were not far behind. The result, therefore, of the Florida Supreme Court's opinion is that property owners have been denied the right to assert a want of benefit to their properties because they delayed for thirty-eight days to bring their suit. Surely, so short a delay will not prevent the raising of questions so substantial.[7]

Manifestly, the opinion of the Florida Supreme Court is wrong. "When notice is a person's due", the insufficiency of the notice cannot estop him from asserting his rights under the due process clause. Otherwise, constitutional guarantees would be scraps of paper.

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[7]There is a doubt as to whether the limitation on review is ten or twenty days. By Ch. 14229, Acts, 1929, the Legislature amended the City Charter by providing that the confirmation of an assessment roll "under Par. q of Sec. 56" should be final unless steps were taken in a court of competent jurisdiction within twenty days. Sec. q has no relation to the matter of protesting the assessment but whether the amendment is legally operative cannot be positively stated. The City has taken the position throughout that the limitation is ten days (R. 13). In any case, the amendment would seem to indicate legislative recognition that ten days was not long enough.

Another reason why it is inequitable to apply the doctrine of estoppel against the Appellants is that to do so would result in unlawful discrimination. The matter of this discrimination was raised on motion (R. 58) which disclosed that after throwing the double burden of original construction and subsequent resurfacing on the complaining taxpayers here, the City, with discriminating generosity, made similar improvements in nearby streets, some of which were continuations of streets in the districts here involved[8] or adjoined them (R. 16, 61) and made no assessment on the abutting lands.* We pressed this fact—discovered after the appeal had been taken—upon the Florida Supreme Court's consideration as further evidence of municipal wrong-doing. We argued that for the City to lay an assessment against some while doing the same

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[8]The district in the Hamilton case as noted in footnote 4 is H-477 and embraces, among others, Miami Avenue. The Ganger District is H-503. The new district referred to above is H-508 and includes Miami Avenue at the point where the resurfacing ended in District H-477.

*The record (59) contained an inter-departmental memorandum from the City Finance Director, in which he said:

> "On December 20, 1955, a memorandum was directed to you advising that Highway Improvement District H-508 was to be an assessment district.
>
> My attention has been called to the fact that the City Commission, at about the time this district was ordered, verbally declared all resurfacing work paid out of Florida Power and Light Bond Funds was *not* to be ASSESSED.
>
> Consequently after the district was ordered and confirmed, we purposely failed to adhere to the charter requirement of hearing objections to the completed work. This, in effect, made the district invalid as far as assessments were concerned.
>
> Although pending liens exist against the District's properties, the City Attorney's office, upon being contacted to determine the method of removing the liens, deemed such action inadvisable at that time because of litigation of other districts of a similar nature. (fol. 63) As soon as clearance is received from the Law Department, we will arrange to have the pending liens removed by Commission Action."

work, without charge, in the same neighborhood for others, would violate constitutional guaranties as to equal protection of the law. Like the appeal with respect to the insufficiency of the notice, this plea against discrimination fell on deaf ears.

The City's action in the instant cases is unconscionable. The streets had originally been paved at the expense of the abutting owners. The work which was done amounted to repair, which actually is maintenance for which the public is responsible. The work was paid for out of *surplus* funds which had been accumulated in the City's general fund for several years (R. 6). Therefore, the statement in the Florida Supreme Court's opinion (R. 40) that to permit this suit to be maintained would be disastrous to the fiscal affairs of the City is pointless. This fact also completely refutes the statement in the same opinion (*id.*) that the charter requirements afford the City the opportunity of financing such improvements, the implication being that such suits might prevent this. Expediency has never been considered a substitute for the observance of constitutional rights. If it were, there would be little need for written constitutions, which are a constant reminder that ends do not justify means. But the suggestion that municipal opportunity would be frustrated by these proceedings is as inaccurate as it is illogical. Here the funds for the work were already in the till and actually the City was simply reimbursing itself for work which actually it was obligated to do.

The hearing accorded the taxpayers by the newspaper notice was, to borrow from the Florida Supreme Court's statement in *Redman* v. *Kyle*, 76 Fla. 79, 80 So. 300, merely the shadow and not the substance, was nothing but the shell and not the fruit of the constitutional guaranty against the deprivation of property without due process of law.

CONCLUSION.

The opinions and orders of the Supreme Court of Florida, insofar as they held that the notices in question were valid and that the determination by the Commission of the City of Miami as to benefits which were based on such notices estopped the property owners from showing a lack of benefits are contrary to the opinions and judgments of this Court in the cases cited herein, and particularly *Wisconsin Electric Power Co.* v. *City of Milwaukee*, 352 U. S. 948. Therefore, the judgments of the Supreme Court of Florida in both cases should be reversed with directions to affirm the final decrees of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County.

Respectfully submitted,

.....,

CLYDE EPPERSON,

.....,

HERBERT L. NADEAU,

.....,

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Attorneys for Appellants.

I, Thomas H. Anderson, one of the attorneys for the appellants herein, and a member of the Bar of the Supreme Court of the United States, certify that on the day of January, 1959, I served a copy of the foregoing Appellants' Brief on the City of Miami by mailing a copy in a duly addressed envelope with sufficient postage prepaid to carry the said Brief to Milton M. Ferrell, the City Attorney for the City of Miami, Five Fifty Building, 550 Brickell Avenue, Miami 32, Florida.

.....

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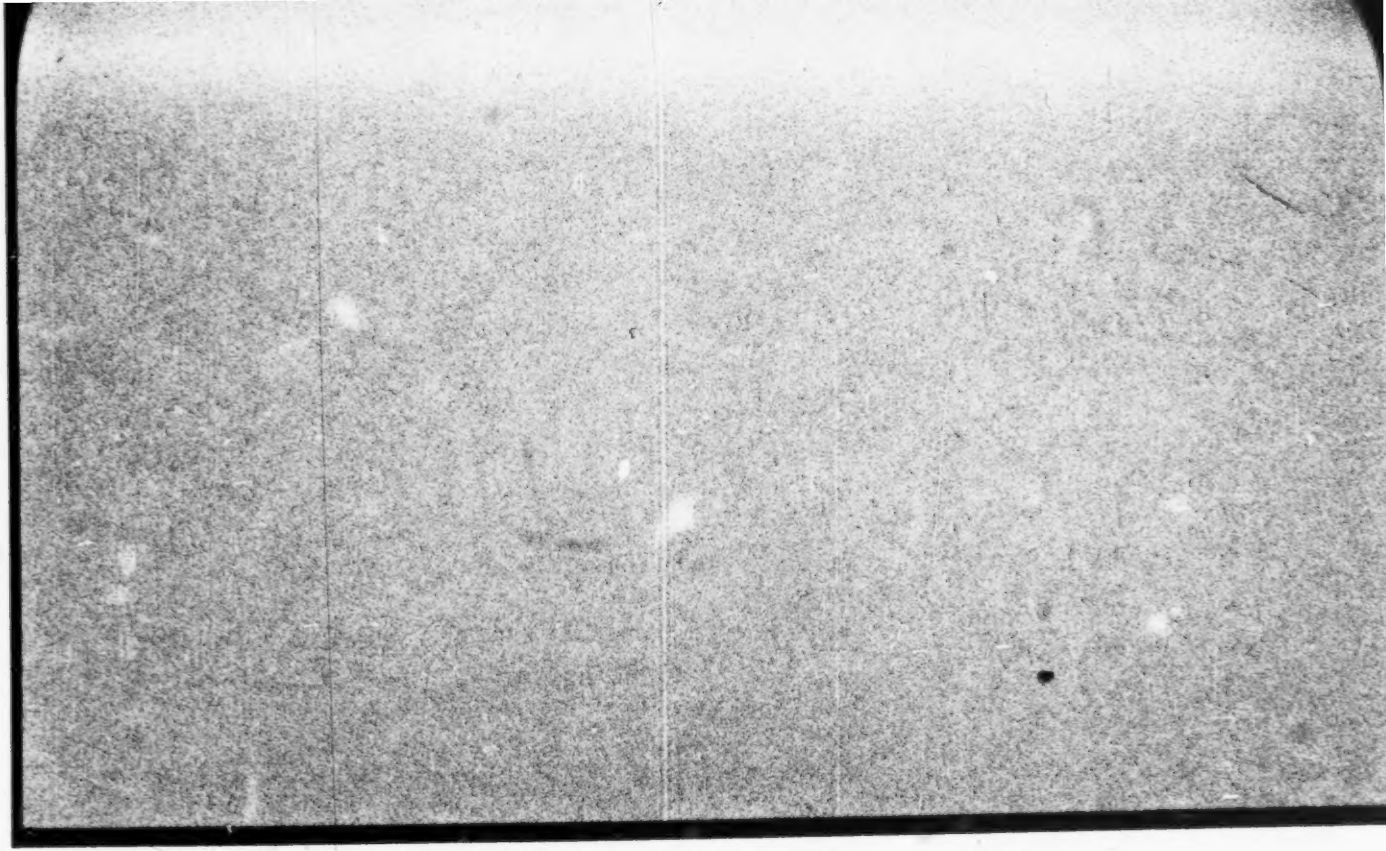
APPENDIX



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CHARTER OF THE CITY OF MIAMI, CHAPTER 10847, LAWS OF FLORIDA, 1925.

Sec. 56. Improvements.

(A) Class 1. Highway improvements embrace the grading, paving, re-paving, macadamizing and re-macadamizing of highways, with necessary drainage, sewer inlets, manhole and catch basins and, if the commission so orders, may embrace curbs and gutters.

(C) **Initial proceeding by resolution of commission.** The initial proceedings for a local improvement hereunder shall be the passage at a regular or special meeting of the commission of a resolution ordering the same to be made under this section, indicating the location by terminal points and route, and either giving a description of the improvement by its material, nature, character and size, or giving two or more such descriptions with the direction that the material, nature, character and size be subsequently determined in conformity with one of such descriptions. A single resolution may embrace one improvement only or one improvement of each of two or more classes of improvements. An improvement need not be continuous and may be in more than one locality or highway, but a highway or sidewalk improvement shall be practically uniform in cost and kind throughout the improvement, and a sanitary sewer improvement shall not provide for a curb sewer as a part of the improvement, and a sewer at or near the middle of a high-

way as another part. Nothing herein contained shall prevent the commission from excluding from any highway improvement that portion of the highway which has been improved by any railroad or any portion which the city may, under the franchise or contract with such railroad, require it to improve. If the resolution shall order a waterfront improvement or storm sewer improvement, it shall designate the property which the commission deems will be specially benefited thereby, and, if a waterfront improvement be ordered, the resolution shall indicate the proportion of the cost thereof which shall be borne by the city at large, and the proportion thereof which shall be specially assessed. A resolution may give any short and convenient designation to each improvement ordered thereby, and the property against which assessments are to be made for the cost of such improvement shall be designated as a district, followed by a letter or number or name to distinguish it from other districts, after which it shall be sufficient to refer to such improvement and property by such designations in all proceedings, assessments and bonds, except in the notice provided by paragraph (e) of this section.

(E) **Publication of notice of hearing.** The city clerk, upon the filing with him of such plans, specifications and estimates, shall publish once in a daily newspaper of general circulation published in the city a notice stating that at a meeting of the commission on a certain day and hour, not earlier than ten days from such publication, the commission will hear the objections of all in-

terested persons to the confirmation of said resolution, which notice shall state in brief and general terms a description of the proposed improvement with the location thereof, and shall also state that plans, specifications, and estimates of the cost thereof are on file in the office of the city clerk.

(F) **Hearing objections; repeal or confirmation.** At the time named in said notice, or to which an adjournment may be taken, the commission shall receive any objections of interested persons and may then or thereafter repeal or confirm said resolution with such amendments, if any, as may be desired by the commission and which do not change in any way, the location of the improvement or improvements; provided, however, that such resolution shall not then or thereafter be confirmed if it contains items which cannot be properly charged to the property owners or if it is, for any default or defect in the passage or character of the resolution or estimate, void or voidable in whole or in part, or if it exceeds the power of the commission, and if any objection shall be made to the resolution on any such ground as provided by the paragraph (h) hereof.

(H) **Manner of making objections.** All objections to any improvement resolution on the grounds that it contains items which cannot be properly charged to the property owners, or that it is, for any default or defect in the passage or character of the resolution or estimate, void or voidable in whole or in part, or that it exceeds the power of the legislative body of the municipality, shall be made in writing, in person or by attorney, and

filed with the city clerk at or before the time or adjourned time of such hearing. Any objections against the making of an improvement not so made shall be considered as waived, and if an objection shall be made and overruled or shall not be sustained, the confirmation of the resolution shall be the final adjudication of the issue presented unless proper steps shall be taken in a court of competent jurisdiction to secure relief within ten days.

(J) (n) **Assessment of Individual Lots. According to special benefits or frontage.** The amount of the cost of water front improvements and storm sewers, excluding laterals, so apportioned to lots and parcels of land, shall in said roll be assessed to the several lots and parcels within the district in the proportion which the city manager deems to be in the proportion of special benefits each such lot or parcel will receive, and the amount of cost of each highway, sidewalk and sanitary sewer improvement, except laterals, so apportioned to abutting property shall be assessed in said roll against such abutting property according to frontage.

(L) **Notice of hearing after filing preliminary assessment roll.** Upon the filing with the city clerk of the preliminary assessment roll required by this section, the city clerk shall publish once in each of two successive weeks in a daily newspaper of general circulation published in the city, a notice stating that at a regular meeting of the commission held on a certain day and hour, not less than twelve days from the date of the first publication, all interested persons may appear and file written objections to the confirmation of said roll.

(M) **Hearing objections and actions thereon.** At the time and place stated in such notice the commission shall meet and receive the objections in writing of all interested persons as stated in said notice. Then or thereafter, the commission shall either annul or sustain or modify in whole or in part the *prima facie* assessment as indicated on said roll, either by confirming the *prima facie* assessment against any or all lots or parcels described therein, or by cancelling, increasing or reducing the same, according to the special benefits which said commission decides each said lot or parcel has received, or will receive on account of such improvement. If any property which may be chargeable under this section shall have been omitted from said preliminary roll or if the *prima facie* assessment has not been made against it, the commission may place on said roll an apportionment to said property. The commission may thereupon confirm said roll, but shall not confirm any assessment in excess of the special benefits to the property assessed, and the assessments so confirmed shall be in proportion to the special benefits. Forthwith after such confirmation said assessment roll shall be delivered to the director of finance, and such confirmation shall be final and conclusive except as hereinafter provided.

(N) **Appeal to court.** If the owners of any railroad or any lot or parcel of land so assessed shall within ten days from such confirmation file a written verified petition in the office of the clerk of the circuit court of Dade County, setting forth that the amount so assessed against any property of the petitioner exceeds the amount of the

special benefit the petitioner has sustained or will sustain by reason of such improvement, or is out of proportion to benefits, or that the assessment is invalid, for any reason whatsoever, and shall at the same time file with said clerk a written undertaking in at least the sum of two hundred dollars ($200.00), with a good and sufficient surety to be justified before and approved by the said clerk, to the effect that the petitioner will pay to said city all costs and damages to be sustained by it by reason of such proceeding, and shall, within ten (10) days from such confirmation, deliver (to) the city manager or leave in his office a copy of said petition, then the validity of such assessment against said property shall be determined as hereinafter provided. Within ten (10) days after the delivery of said copy of petition then the validity of such assessment against said property shall be determined as hereinafter provided. Within ten (10) days after the delivery of said copy of petition to the city manager or, at his office, the city manager shall appear and answer the said petition, and the case shall be heard upon such petition and answer and upon such evidence as may be presented to the court. The judge of the court shall hear and determine the cause, in term or vacation, giving such hearing and determination precedence over all other cases so far as the same may be practicable. The decision of the court in such proceedings shall be final, and an appeal shall be allowed only if properly prayed and perfected ten (10) days from the date of the order; if the assessment against such property shall be sustained or reduced or abated by the court, the

director of finance shall note that fact on the assessment roll opposite the description of the property whose assessment was so contested; the cost of any such proceedings shall be paid by the party complaining of such assessment, unless the said assessment is abated or is reduced by the court ten per cent (10%) or more, and judgment shall be rendered against him for the amount of such cost; in case such assessment shall be abated or shall be reduced ten per cent (10%) or more, such costs and expenses shall be paid by the city and judgment shall be entered against it for the amount thereof.

(O) **Amount of assessment set aside by court may be charged to city or new assessment roll may be prepared.** The amount of the special assessment against any lot or parcel which may be set aside by the court, unless the assessment upon the entire district be set aside, or the amount by which such assessment is so reduced, may by resolution of the commission be made chargeable against the city at large; or, in the discretion of the commission a new assessment roll may be prepared and confirmed in the manner hereinbefore provided for the preparation and confirmation of the original assessment roll, except that no notice of hearing upon such roll need be published or given as to any property unless the assessment against it is increased. The commission shall take prompt action as herein provided in case of the reduction or invalidation of any assessment, and any such action shall be noted by the director of finance on said assessment roll, unless a new roll shall be made and confirmed, in which case the

former roll shall be a nullity and the right of petition to the circuit court as to the amounts apportioned by the new roll shall again be in force as to such new roll.

RESOLUTION NUMBER 25006.

Highway Improvement District H-503.

A RESOLUTION ORDERING LOCAL IMPROVEMENT H-503 BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF MIAMI: That a local improvement, described and designated as follows, shall be made under Section 56 of the City Charter:

Highway Improvement H-503 as follows:

ON:

South Miami Avenue, from S. W. 15th Street Road to 200′ more or less south of Alatka Street.

This street shall be resurfaced from curb to curb with approximately 1/2″ leveling course and 1″ surface course of asphaltic concrete, including returns and intersections.

The property against which special assessments for the cost thereof shall be made is hereby designated District H-503.

PASSED AND ADOPTED this 19th day of November, 1952.

Filed in Evidence
7/22/54
Plff. Ex. #10

THE MIAMI HERALD
Published Daily
Miami - Dade - Florida

STATE OF FLORIDA
COUNTY OF DADE:

Before the undersigned authority personally appeared M. F. Self, who on oath says that he is Classified Advertising Manager of The Miami Herald, a daily newspaper published at Miami in Dade County, Florida; that the attached copy of advertisement, being a ..... in the matter of ..... in the ..... Court, was published in said newspaper in the issues of November 22, 1952.

(s) M. F. Self

Sworn to and subscribed before me this 22nd day of November, A.D. 1952.

(s) J. Fenwick Brossier
Notary Public, State of Florida at Large

My commission expires June 12, 1956.

Filed in Evidence
7/22/54

Plff. Ex. #10

NOTICE OF LOCAL IMPROVEMENT

Highway Improvement
District 503

All interested will take notice that at a meeting of the City Commission at 9:30 o'clock A. M. December 3rd, 1952, their objections will be heard to the confirmation of Resolution No. 25006, adopted November 19th, 1952, ordering paving improvements on South Miami Avenue, from S. W. 15th Street Road to 200′ more or less south of Alatka Street, designated improvement H-503. Plans, specifications and estimate of cost of said improvement are on file in the City Clerk's office.

F. L. CORRELL
City Clerk

November 22, 1952

RESOLUTION No. 25017.

A Resolution Confirming the Ordering Resolution for Paving Improvements Included in Highway Improvement District H-503.

WHEREAS, at a meeting of the City Commission at 9:30 a. m., December 3rd, 1952, objections were heard to the confirmation of Resolution No. 25006, adopted November 19th, 1952, ordering local paving improvements in the area designated as Highway Improvement District H-503, and the plans, specifications and estimates of cost thereof, and no objections were filed;

NOW, THEREFORE, BE IT RESOLVED BY THE COMMISSION OF THE CITY OF MIAMI, FLORIDA:

Section 1. That Resolution No. 25006, adopted November 19th, 1952, ordering local paving improvements in the area designated as Highway Improvement District H-503 be, and the same is hereby, confirmed.

PASSED AND ADOPTED this 3rd day of Dec., 1952.

Filed in evidence
7/22/54

Plaintiffs' Exhibit #10

THE MIAMI HERALD
Published Daily
Miami - Dade - Florida

STATE OF FLORIDA,
COUNTY OF DADE:

Before the undersigned authority personally appeared M. F. Self, who on oath says that he is Classified Advertising Manager of The Miami Herald, a daily newspaper published at Miami in Dade County, Florida; that the attached copy of advertisement, being a .....
in the matter of .....
in the .....
Court, was published in said newspaper in the issues of January 19, 26, 1954.

(s) M. F. Self

Sworn to and subscribed before me this 28th day of January, A. D. 1954.

(s) J. Fenwick Brossier
Notary Public,
State of Florida
at Large.

My Commission expires June 12, 1956.

Filed in Evidence
7/22/54

Plff Ex. #10

NOTICE TO PROPERTY OWNERS

Preliminary Assessment Roll District H-503

All interested will take notice that at a meeting of the City Commission at 9:30 o'clock AM February 3rd, 1954, their objections will be heard to the confirmation of the Preliminary Assessment Roll for the cost of paving improvements on South Miami Avenue, from SW 15th Road to 320 feet more or less South of Alatka Street, in District H-503.

Said Preliminary Assessment Roll is now open to public inspection in the City Clerk's Office.

F. L. CORRELL
CITY CLERK

Jan 19, 26: 1954

RESOLUTION No. 26250.

A Resolution Confirming the Preliminary Assessment Roll for Construction of Certain Paving Improvements in a Portion of Highway Improvement District H-503.

WHEREAS, the Commission of the City of Miami, Florida, met on the 3rd day of February, 1954, pursuant to due legal notice of said meeting under Secton 56, City Charter to hear all written objections to the confirmation of the preliminary assessment roll for the cost of paving improvements, as follows:

South Miami Avenue from S. W. 15th Road to 320 feet, more or less South of Alatka Street

in a portion of Highway Improvement District H-503, and

WHEREAS, no objections thereto were made by any person interested in, or affected by said assessment roll and the said assessment roll appearing, in all respects. regular and in accordance with the requirements and provisions of the City Charter;

NOW, THEREFORE, BE IT RESOLVED BY THE COMMISSION OF THE CITY OF MIAMI, FLORIDA:

Section 1. That the *prima facie* assessments, as apportioned and indicated on said preliminary assessment roll be, and they are hereby, in all things, confirmed and sustained against any and all lots or parcels of ground described therein.

Section 2. That the sums and amounts assessed against each of the lots or parcels of ground in said preliminary rolls are less than the amount that each of the said lots or parcels of ground is especially benefited by said improvement and that such amounts are in proportion to the special benefits that the property received and that the proportion of said costs to be paid by the City of Miami are the sums set forth opposite the same therein.

Section 3. That the total cost of the said paving improvements in the sum of $41,395.48 be, and the same is hereby, approved and confirmed.

PASSED AND ADOPTED this 18 day of Feb., 1954.

Filed in evidence
7/22/54
Plaintiffs' Exhibit #10

RESOLUTION No. 22277.

Highway Improvement H-477 District. A Resolution Ordering Local Improvement H-477.

BE IT RESOLVED by the City Commission of the City of Miami: That a local improvement, described and designated as follows, shall be made under Section 56 of the City Charter:

Highway Improvement H-477 as follows (names of some streets omitted):

For resurfacing of existing asphaltic concrete pavement with a fifty pound (50 #) asphalt concrete leveler course and one inch (1") asphaltic concrete wearing surface, including necessary intersection returns and intersections.

The property against which special assessments for the cost thereof shall be made is hereby designated District H-477.

PASSED AND ADOPTED this 1st day of Mar., 1950.

Filed in evidence

Defendant's Exhibit #1
7/20/54
M. C. W.

THE MIAMI HERALD
Published Daily
Miami - Dade - Florida

STATE OF FLORIDA
COUNTY OF DADE:

Before the undersigned authority personally appeared M. F. Self, who on oath says that he is Classified Advertising Manager of The Miami Herald, a daily newspaper published at Miami in Dade County, Florida; that the attached copy

NOTICE OF LOCAL IMPROVEMENT

Highway Improvement
District H-477

All interested will take notice that at a meeting of the City Commission at 9:30 o'clock A. M. March 15th, 1950, their objections will be heard to the confirmation of Resolution No. 22277, adopted March 1st, 1950, ordering paving improvements on

of advertisement, being a ..... in the matter of ..... in the ..... Court, was published in said newspaper in the issues of

3/4, 1950

(s) M. F. Self

Sworn to and subscribed before me this 6th day of March, A. D. 1950.

(s) Louise Muhleman
Notary Public, State of Florida at Large

My commission expires Nov. 4, 1953.

Bonded by American Surety Co. of N. Y.

Filed in Evidence 7/22/54

Defendant's Exhibit "C"

the following avenues, to-wit:

NE. 1st Avenue from S. E. 2nd Street to N. E. 14th Street; NE. 2nd Avenue from Flagler Street to 41st Street; N. W. and S. W. 3rd Avenue from S.W. 1st Street to N. W. 20th Street; South Miami Avenue from S. W. 1st Street to S. W. 15th Road; North Miami Avenue from Flagler Street to N. W. 20th Street; N. W. 2nd Avenue from N. W. 20th Street to N. W. 36th Street; S. W. 17th Avenue from Flagler Street to Tamiami Trail. Designated Improvement H-477. Plans, specifications and estimate of cost of said improvement are on file in the City Clerk's Office.

F. L. CORRELL
City Clerk

3-4-50

RESOLUTION No. 22301.

A Resolution Confirming Resolution No. 22277 Ordering Paving Improvement in Highway Improvement District H-477.

WHEREAS, at a meeting held at 9:30 o'clock A. M., March 15, 1950, after legal notice, the City Commission heard all objections presented by interested persons to the confirmation of Resolution No. 22277, ordering Highway Improvement District H-477, which included construction on the following streets (names omitted):

and the plans and specifications and estimate of cost thereof, and no objections were sustained;

NOW, THEREFORE, BE IT RESOLVED BY THE COMMISSION OF THE CITY OF MIAMI, FLORIDA:

That Resolution No. 22277, adopted March 1st, 1950, ordering Highway Improvement District H-477, be, and the same is hereby confirmed.

PASSED AND ADOPTED this 15th day of Mar., A. D. 1950.

Filed in Evidence

Defendant's Exhibit #1
7/20/54
Marshall C. Wiseheart

MIAMI DAILY NEWS
Published Daily
Miami, Dade County,
Florida

STATE OF FLORIDA,
COUNTY OF DADE:

Before the undersigned authority personally appeared Jacob Booth who on oath says that he is Controller of the Miami Daily News, a daily newspaper published at Miami in Dade County, Florida; that the attached copy of advertisement being legal notice in the matter of Preliminary Assessment Roll — District H-477 in the ..... Court, was published in said newspaper in the issues of February 20 & 27, 1953.

(s) Jacob Booth

Sworn to and subscribed before me this 27th day of February, A. D. 1953.

(s) Roland Wilfred Vandson

(Seal) Notary Public, State of Florida at Large

My commission expires May 15, 1955.

Bonded by American Surety Co. of N. Y.

Filed in Evidence

Defendant's Exhibit "F"

NOTICE TO PROPERTY OWNERS

Preliminary Assessment Roll District H-477

All interested will take notice that at a meeting of the City Commission at 9:30 o'clock A. M. March 4th, 1953, their objections will be heard to the confirmation of the Preliminary Assessment Roll for the cost of paving improvements on the following Avenues, to-wit:

SE & NE 1st Ave. from SE 2nd St. to N. E. 14th St.; N. Miami Ave. from Flagler St. to North 20th St. in District H-477.

Said Preliminary Assessment Roll is now open to public inspection in the City Clerk's Office.

F. L. CORRELL
CITY CLERK

RESOLUTION No. 25364.

A Resolution Confirming the Preliminary Assessment Roll for Construction of Certain Paving Improvements in a Portion of District H-477.

WHEREAS, the Commission of the City of Miami, Florida, met on the 4th day of March, 1953, pursuant to due legal notice of said meeting under Section 56, City Charter, to hear all written objections to the confirmation of the preliminary assessment roll for the cost of paving improvements on the following avenue:

N. E. 2nd Avenue from Flagler Street to N. E. 41st Street in District H-477.

WHEREAS, no objections thereto were made by any person interested in or affected by said assessment roll and the said assessment roll appearing in all respects regular and in accordance with the requirements and provisions of the City Charter;

NOW, THEREFORE, BE IT RESOLVED BY THE COMMISSION OF THE CITY OF MIAMI, FLORIDA:

Section 1. That the *prima facie* assessments, as apportioned and indicated on said preliminary assessment roll be, and they are hereby, in all things, confirmed and sustained against any and all lots or parcels of ground described therein.

Section 2. That the sums and amounts assessed against each of the lots or parcels of ground in said preliminary roll are less than the amount that each of the said lots or parcels of ground is especially benefited by

said improvement and that such amounts are in proportion to the special benefits that the property received and that the proportion of said costs to be paid by the City of Miami are the sums set forth opposite the same therein.

Section 3. That the total cost of the said improvements in the sum of $55,001.13 be, and the same is hereby, approved and confirmed.

PASSED AND ADOPTED this 18th day of Mar., 1953.

Filed in evidence

Defendant's Exh. #1
7/20/54

Marshall C. Wiseheart

(The City, the same day, passed Resolutions Nos. 25365, 25366, 25367 and 25368, with respect to District H-477 which are identical with the foregoing resolution except as to the description of the streets and the amount of assessment.)

JAN 24 1959
JAMES R. BROWNING, C

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 153

NORTON R. GANGER, L. C. BETHART, THOMAS B. HAMILTON ET AL.,

Appellants,

vs.

CITY OF MIAMI, A MUNICIPAL CORPORATION,

Appellee.

Appeal from the Supreme Court of the State of Florida

BRIEF OF APPELLEE

MILTON M. FERRELL
Five Fifty Building
550 Brickell Avenue
Miami 32, Florida
Attorney for Appellee

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 153

NORTON R. GANGER, L. C. BETHART, THOMAS B. HAMILTON ET AL.,

Appellants,

vs.

CITY OF MIAMI, A MUNICIPAL CORPORATION,

Appellee.

Appeal from the Supreme Court of the State of Florida

BRIEF OF APPELLEE

STATEMENT OF THE CASE

There is involved two appeals in two separate suits from decisions of the Supreme Court of Florida. The questions of law and fact in the two cases being the same or similar, the decision of the Supreme Court of Florida in one was made applicable to the other. These are the decisions upon which was based the judgments appealed from. The final opinion of the Supreme Court of Florida

applicable to both suits is shown in the record at Pages 48 to 53, inclusive. A single petition for rehearing, applicable to both suits, was denied by the Supreme Court of Florida without any opinion. (R. 70-71). These suits involve the assessment of municipal improvement liens against property owners under a Florida statute for improvements to streets or roads.

JURISDICTION OF SUPREME COURT OF UNITED STATES

The appellee, CITY OF MIAMI, FLORIDA, moved to dismiss the appeals on the ground (a) that they were not within the jurisdiction of the Supreme Court of the United States, and, (b) the Federal questions presented were not passed on by the trial or appellate court in Florida. The United States Supreme Court postponed consideration of the question of jurisdiction to the hearing of the cases on the merits, and directed all counsel to discuss the question of whether the constitutional issues were raised and decided below.

The amended complaint which was substantially the same in both cases, among other things, stated that it was brought to invalidate special assessment liens (R 1), made under a City resolution (R 2); that notice of a meeting of the City Commission for the confirmation of this resolution was published in a newspaper (R-3-4); that no objections to such confirmation were filed. (R 5). The Constitution of the United States is only mentioned once in said amended complaint. (Par. 12 - R. 6). In this instance it states that the liens are void and constitute taking of property in violation of the Constitution of the United States upon seven (7) grounds specified therein. (Grounds

R 7). The said amended complaint nowhere makes any statement as to any particular article or section of the Constitution of the United States. The said seven (7) grounds do not mention any statute of the State of Florida other than Chapter 56 of the Charter of the City of Miami, and alleges concerning said Chapter 56 that the resolutions of the city "do not comply with Chapter 56 of the Charter of the City of Miami in that the properties against which the assessments were made were not designated as required by said Chapter." (Par. D - R 7). The other six grounds in substance allege that the resolution for the work was insufficient, that the notice published had defects, did not give notice and was improperly published, that the improvements were not for the benefit of the property owners, that the attempt to assess violated a rule laid down by the Florida Supreme Court, and that the apportionment of the cost between the proper owners was disproportionate to the benefits conferred. Nowhere in this complaint is there any charge that any statute of the State of Florida violates the Federal constitution, but only statements that actions taken by the city under a statute were legally insufficient or did not comply with the statute and that the property owners were not benefited. The prayer in this amended complaint was that the court decree the assessments to be void and enter an injunction. (R 8).

The final decree of the trial court nowhere therein mentions the Constitution of the United States or of the State of Florida. (R. 22 - 25). The said final decree after finding facts, among which were (a) "the notice was insufficient as a matter of law", and (b) "no benefit was conferred upon the property owners", (R. 23), then ordered that the city was without lawful authority to impose

the liens upon the property owners, and that the action of the city in so doing "was unreasonable and null and void."

So, we see that the final decree of the trial court did not pass upon any Federal or constitutional question at all.

Upon the appeal to the Supreme Court of Florida, and under the first majority opinion written by it, (R. 32-41) there was no discussion of any constitutional question either State or Federal. This opinion held in substance that the notice was valid and substantially conformed to the statute, (R. 35) that the court could not agree with the trial court, that there was no benefit to the property owners (R. 35), but that the City had no authority to levy the assessments under its Charter, (R. 36), and, therefore, the judgment of the lower court would be affirmed.

On a rehearing the Supreme Court of Florida wrote a majority opinion reversing the trial court (R. 48-53). This opinion did not discuss any constitutional question whatsoever. It held (a) the City did have power under its charter to assess the liens (R. 50), (b) the Court was unanimously of the opinion that the notice was valid and complied with the charter (R. 50), and (c) the property owners were estopped to question the assessments for their failure to promptly assert their rights (R. 52). The facts of estoppel are clearly set forth in a note at the bottom of pages 50-51 of the Record. Even the dissenting judges (R. 53-57) agreed with the majority on all matters except the holding that the City had the power under its charter to levy the assessments (R. 57). The dissentors held the assessment void for lack of statutory power to make them

and that because they were void the estoppel did not apply.

There was no Federal question involved or decided in any decision of any of the Florida Courts in these cases, trial or appellate. The only dispute among the judges was over the construction of the State Statute as to the power of the City of Miami to levy the assessments. The judgment of the trial court was placed squarely on the ground that the City was without authority to levy the assessments under said Statute (Par. 1 R. 24 following the words "Ordered, Adjudged and Decreed").

Amendment XIV to the Constitution of the United States was mentioned for the first time in the petition for rehearing of appellants (Par. 2. R. 64 and Par. 4 R. 65). The said paragraph 2 stated that lack of notice of the confirmation of the assessment roll was violative of procedural due process and the appellants should not be estopped. This paragraph totally disregards the facts found by the majority final opinion of the Appellate Court on estoppel showing the suit was filed more than a year after the assessments and showing other notices as to the improvements and as to confirmation of the roll without any objections filed (R. 50 - 51 note at bottom of pages).

The said paragraph 4 of the petition for rehearing of the appellants in substance stated that the holding by the Appellate Court, that the notice was sufficient and that the appellants were estopped to challenge lack of benefits to their property for their failure to object pursuant to such notice, was quasi judicial and violated Amendment XIV of the United States Constitution. To substantiate this the appellants cited United States Su-

preme Court decisions. These decisions are also cited by the appellants in their brief on the question of jurisdiction (R. 3), and will be discussed hereinafter.

The appellants admit in their brief, "The Supreme Court of Florida at first affirmed the decree of the Circuit Court on non-Federal grounds." (Page 2 of Brief). The appellants then state in their brief on the question of jurisdiction of the Supreme Court of the United States concerning their petition for rehearing, these words, "This petition called the attention of the Supreme Court of Florida to the applicable and controlling decisions of this Court as to the sufficiency of notices by publication directed to resident property owners." (Page 2 of Brief). Such so called applicable and controlling decisions cited by the appellants in their brief will be discussed hereinafter.

The only argument of the appellants in their brief on the question of jurisdiction of the Court consists of a statement therein that jurisdiction is conferred by Title 28, U. S. Code, Section 1257 (2) and the citation of six United States Supreme Court decisions (Pages 2-3 Brief). None of said decisions so cited is applicable as is hereinafter set forth. The first of said decisions was **MULLANE v. CENTRAL HANOVER BANK & TRUST COMPANY, 339 U.S. 306, 94 L ed 865, 70 S Ct 652.** This case involved the validity of a New York Statute concerning trust companies which permitted the trustee to have a judicial settlement of its account by publication in a newspaper. The Court in this case held such Statute to be unconstitutional.

The second case cited by appellants was **NEW YORK**

v. **NEW YORK, N.H. & H.R. CO., 344 U.S. 293, 97 L ed 333, 73 S Ct 299.** This case involved lack of notice to a creditor under the Bankruptcy Act. The creditor was not notified by mail but by publication in a newspaper. The Court held the failure to file a creditor's claim was excused for lack of proper notice.

The third case cited by the appellants was **COVEY v. TOWN OF SOMERS, 351 U.S. 141, 100 L ed 1021, 76 S Ct 724.** This case involved a foreclosure against an incompetent and whether or not he was properly served. In this case the New York Court of Appeals certified that due process was raised and decided by it.

The fourth case cited by appellants was **WALKER v. CITY OF HUTCHINSON, 352 U.S. 112, 1 L ed 2d 178, 77 S Ct 200.** This case involved a condemnation proceeding in which process was obtained by publication in a newspaper. The owner of the property concerned brought a suit in equity for the express purpose of obtaining a holding that the newspaper publication under a state statute was not due process. This court held that the same was not due process.

The fifth case cited by the appellants was **WISCONSIN ELECTRIC POWER COMPANY v. CITY OF MILWAUKEE, 352 U.S. 948, 1 L ed 2d 241, 77 S Ct 329.** The jurisdiction of this Court was taken in that case under the authority of the decision rendered in **WALKER v. CITY OF HUTCHINSON,** supra.

The sixth case cited by appellants was **LAMBERT v. THE PEOPLE OF THE STATE OF CALIFORNIA, 355 U.S. 225, 2 L ed 2d 228, 78 S Ct 240.** This case held that an

ordinance compelling convicted criminals to register was unconstitutional in the absence of such ordinance containing words that the criminals had knowledge of the ordinance or wilfully failed to register.

Thus we see that every decision cited by appellants either concerned process in judicial proceedings, or concerned construction of the bankruptcy law, or concerned a criminal prosecution for failure to do an act the asserted criminal did not know he was obligated to do. None of these cases are applicable to taxation by a state or city and not one case was cited by the appellants upon the question of the requisite notice involved in taxation or assessments of liens.

This Court has spoken several times in reference to the levying of special assessments against property both in connection with the question of benefits to the property concerned as well as the question of necessity for notice. It has held that where the improvement is made on authority of the legislature or by a municipality to which the State has granted legislative powers, the owners of the property have no constitutional right to be heard on the question of benefits.

Some of these cases are as follows:

BROWNING v. HOPPER, 269 U.S. 396, 70 L ed 330, 46 S Ct 141.

MEMPHIS & C.R. CO. v. PACE, 282 U.S. 241, 75 L ed 315, 51 S Ct 108.

CHESEBRO v. LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, 306 U.S. 459, 83 L ed 921, 59 S Ct 622.

In **BROWNING v. HOPPER,** supra, the question was directly raised as to whether or not the owners of property would be deprived of due process of law under special assessments to build roads. The legislature did not create the road district, did not confine the same to any political subdivision, and did not contain anything to limit the selection of the property to be assessed. The act provided that by petition of voters selecting property an election should be called and if there was a two-third vote of the people such selection should constitute a road district. In that case this Court used the following language:

> "Where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits."

In that case they did hold the statute unconstitutional because the district was not created by the legislature and there had been no legislative determination that the property would be benefited by the local improvement.

In **MEMPHIS & C.R. CO. v. PACE,** supra, State statutes creating road districts and permitting the levy of taxes against property therein were attacked under the due process clause of the Federal constitution. This Court held that the district was created by the legislature, that this was a question of law, and that the decision of the State on this question was controlling. This Court held therein that property owners in districts created under the authority of the legislature and being legislatively

created districts, were not entitled to notice and hearing as to the benefits conferred. This Court held in that case that where such a district was properly created under legislative authority the question of benefit to the property owners are matters which rest in the discretion of the State, and are not controlled by either the due process or the equal protection clause of the 14th Amendment. The validity of the statute was upheld.

The appellants in their brief have not seen fit to cite any cases involving special levies for local improvements or involving taxation in any of its phases. The cases last cited by the appellee are clearly applicable to the question of jurisdiction of the United States Supreme Court in this case.

APPLICABLE CASES WHERE THE SUPREME COURT OF THE UNITED STATES WILL NOT TAKE JURISDICTION

This Court has held that it will not review what was not decided by the highest state court. **WALTERS v. ST. LOUIS, 347 U.S. 231, 98 L ed 660, 74 S Ct 505.** This Court in the opinion in that case under headnote 5 thereof stated as follows:

> "Of course, we will not undertake to review what the Court below did not decide. * * * We have here only the very limited issue—does the statute or the ordinance on its face violate the Fourteenth Amendment?".

The United States Supreme Court will not review Federal questions where the judgment rests upon adequate State grounds, even though the opinion under re-

view might discuss such Federal questions. **BLACK v. CUTTER LABORATORIES, 351 U.S. 292, 100 L ed 1188, 76 S Ct 824.** In the opinion in this last case this question is decided under headnote 3 thereof.

Where the highest court of the State delivers no opinion and it appears that the judgment might have rested upon a non-Federal ground, the Supreme Court will not take jurisdiction to review the judgment. **DURLEY v. MAYO, 351 U.S. 277, 100 L ed 1178, 76 S Ct 806.**

The Supreme Court will not review where the Federal question was not raised in accordance with law. **EDELMAN v. CALIFORNIA, 344 U.S. 357, 97 L ed 387, 73 S Ct 293.** This question was discussed under headnote 1 in the opinion of the above case.

As has been shown in this brief hereinabove, the final decree of the trial Court did not mention the Constitution of the United States or the State but ordered that the City was without authority to impose liens. This was clearly only a State ground and the Supreme Court of Florida had no power to pass upon that which was not decided by the trial Court. The first attempt of the appellants to raise any Federal question was made in their petition for rehearing upon the final majority judgment of the Florida Supreme Court. The Florida Supreme Court did not at any time discuss any Federal question. The only disagreement between the judges was upon the question as to whether or not the City had the power under the statute to do what it did. The appellants in their said petition for rehearing attempted to bring in Federal questions by making it appear that proceedings involved were quasi judicial. As has been shown in this brief herein-

above, the matter involved is taxation through local assessments and has no connection with process in judicial proceedings.

CONCLUSION

The Supreme Court of Florida has decided a purely State question without discussing any Federal question. Its opinion is based purely upon a State ground. The trial Court or the Supreme Court of Florida did not decide any Federal question. The sole question involved was the validity of assessment for improvements upon property in a district established under authority of the legislature and this is purely a State question. Under Federal law the property owners have no right to notice in connection with such special assessments levied under authority of the legislature, although the Florida Statute prescribes that a notice shall be given by publication. The Supreme Court of Florida decided that statutory notice was properly given. Certainly there is no Federal question involved in this case, and even if there were, the State Court has decided the question upon a ground which is wholly a State ground. As shown in this brief, the appellants have failed to properly raise any Federal question in any Court, even assuming that any such question did exist.

Respectfully submitted,

MILTON M. FERRELL
Five Fifty Building
550 Brickell Avenue
Miami 32, Florida
Attorney for Appellee

I, MILTON M. FERRELL, attorney for the Appellee herein, and a member of the Bar of the Supreme Court of the United States, certify that on the _____ day of January, 1959, I served copies of the foregoing Appellee's Brief on the Attorneys for Appellants by mailing copies in duly addressed envelopes with sufficient postage prepaid to carry the said Brief to Clyde Epperson, Ingraham Building, Miami 32, Florida, Thomas H. Anderson, 908 First National Bank Building, Miami 32, Florida, and Herbert L. Nadeau, 908 First National Bank Building, Miami 32, Florida, Attorneys for Appellants.

MILTON M. FERRELL
Five Fifty Building
550 Brickell Avenue
Miami 32, Florida
Attorney for Appellee

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 153.

NORTON R. GANGER, L. C. BETHART,
THOMAS B. HAMILTON ET AL.,
Appellants,

vs.

CITY OF MIAMI, a Municipal Corporation,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

REPLY BRIEF OF APPELLANTS.

The appellee City takes two positions in its brief.

One is that no federal constitutional question was presented by the pleadings, decrees and opinions in the courts below.

The other is that even if such a question existed it was not timely raised.

1. The Existence of a Federal Constitutional Question.

The City asserts (B. 12):

> "Under Federal law the property owners have no right to notice in connection with such special assessments levied under the authority of the Legislature, although the Florida Statute prescribes that a notice shall be given by publication."

First. The assessments complained of were not levied under the authority of the Legislature. The assessments were levied under a resolution of the City Commission. The Commission acted pursuant to authority granted by its legislative Charter, but it is a far cry from this to say that the Legislature made a finding of benefits which was incontestable. Indeed, in the cases at bar there was no legally sufficient finding of benefits even under the Charter.

Here the legislative body, the City Commission, did not make the determination of benefits. That determination was made by the city manager. The assessment roll recites (R. 77):

> "I, the undersigned City Manager of Miami. Florida, do hereby certify * * * the total assessment chargeable against each lot or parcel computed according to frontage and is in proportion to special benefits and not in excess of such benefits;"

The City Manager simply assessed the cost on a front foot basis. The City in turn, without inquiry or determination of benefits, simply adopted a resolution confirming the actions of the City Manager and the Resolution contained no such determination (Appendix, Appellants' Brief 18). It was legally insufficient and, being unsupported, constituted a denial of procedural due process. *Gallegos* v. *Nebraska*, 342 U.S. 55; *Morgan* v. *U. S.*, 298 U.S. 468; *Fisher*

v. *Board of County Commissioners of Dade County,* Fla., 84 So.2d 572. In the last case, the court said that "in order to sustain the assessment, there must be some proof of the benefits other than the dictum of the governing body."

Moreover, the Circuit Court on testimony taken made a determination that benefit was lacking. This finding was not seriously questioned on appeal, and a specially concurring opinion of a Justice of the Florida Supreme Court stated that the finding was abundantly supported by the evidence (R. 37).

The cases cited by appellee, in support of their statement, do not sustain the position asserted. These cases are *Browning* v. *Hooper,* 269 U.S. 396; *Memphis & C. R. Co.* v. *Pace,* 282 U.S. 241; *Chesebro* v. *Los Angeles County Flood Control District,* 306 U.S. 459.

In each of the foregoing cases cited by the appellee the district was created by the legislature and a determination of benefits made by the legislature. There is, under the decisions of this Court and all of the authorities, a vast difference between the right to be notified and to be heard on the question of benefits where the improvement district is created by the legislature, as distinguished from such creation by a subordinate body to which the legislature has delegated authority to create a district.

Browning v. *Hooper* involved a road district created by the legislature (Text 404). The suit was brought to restrain the *sale of bonds,* the proceeds of which were to be used by a road district. The statute authorizing the issuance of the bonds also required the affirmative vote of two-thirds of the property owners in the district before the bonds could be issued and sold. In this case the Court also, in the very next sentence following the appellee's quotation, said:

> "But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the Legislature, and there has been no legislative determination that their property will be benefited by the local improvement. * * *"

Memphis & C. Ry. Co. v. *Pace et al.*, the legislature after creation of the improvement district by an inferior body, passed legislative acts confirming the districts (Text 243). That district likewise involved a bond issue consequent upon an election resulting in a vote in favor of the issue. This Court, even under these circumstances, said:

> "But, however, the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause, Houck v. Little River District, supra; and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause. Gast Realty Co. v. Schneider Granite Co., 240 U.S. 55, 36 S.Ct. 254, 60 L.Ed. 523; Kansas City Southern Ry. Co. v. Road Improvement District No. 6, 256 U.S. 658, 41 S.Ct. 440, 67 L.Ed. 758; Road Improvement District No. 1 v. Missouri Pacific R. R. Co., 274 U.S. 188, 47 S.Ct. 563, 71 L. Ed. 922."

In the case at bar the record reveals a finding of no benefits. Also shown is the fact that similar work was done upon extensions of some of the streets which are involved here, and that the cost of the work was paid for by the City out of general funds (R. 58). It is difficult to imagine a case of grosser discrimination.

Chesebro v. *Los Angeles County Flood Control District* also involved a district created by legislative act. In addition, the appellant conceded that his lands were specially benefited. However, the case does enunciate a principle favorable to the appellants, viz.: that an appeal

should not be dismissed for want of jurisdiction if the issue of jurisdiction is "fairly debatable." This Court said:

> "Petitioners appealed to this court; appellees moved, as to the city, to dismiss or affirm on the ground that no federal question was involved; and, as to both appellants, on the grounds that no substantial federal question was presented, and that the decision below rests upon adequate non-federal grounds. We dismissed the city's appeal for want of a substantial federal question and postponed to the hearing on the merits further consideration of the question of jurisdiction and of the motion to dismiss or affirm. City of Los Angeles v. Los Angeles County Flood Control Dist., 305 U.S. 564, 59 S.Ct. 104, 83 L.Ed. .....
>
> That motion is denied. The validity of the statute under the federal constitution was by the petition appropriately drawn in question and in substance the decision of the state supreme court is in favor of its validity. See People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67-69, S.Ct. 61, 63, 73 L.Ed. 184, 62 A.L.R. 785. Its judgment does not depend upon characterization of the statute or mere interpretation of the language employed. Its decision is to the effect that the legislature found that the real property within the flood control district would be specially benefited by the acquisition of the district drainage works and that therefore the appellant and other owners are not entitled to be heard on the question of benefits. * * * We are unable to say that the question is foreclosed by our decisions or that it is so clearly not debatable as to require dismissal for lack of substances. Hamilton v. Regents, 293 U.S. 245, 258, 55 S.Ct. 197, 202, 79 L.Ed. 343; Alton Railroad Co. v. Illinois Commerce Commission, 305 U.S. 548, 59 S.Ct. 430, 83 L.Ed. 344, decided January 16, 1939. * * *"

The difference between an assessment district created directly by the legislature and one created by a subordinate

body to which discretionary authority was delegated by the Legislature is well stated in *48 Am. Jur.* (Special Assessments) 695, Section 156. Citing numerous decisions of this Court, it is there said:

> "Contrary to the view stated in the preceding paragraph, it has been ruled that where the legislature of a state does not itself act in determining an improvement district or area or in making a special or local assessment, but delegates the power to do the same to some subordinate body, due process of law requires that at some stage of the proceedings before the assessment becomes irrevocably fixed, the property owner shall have an opportunity to be heard, of which he must have notice either personal, by publication, or by a law fixing the time and place of hearing. The proceedings in such instance are in their nature judicial in the sense that such right to notice and hearing exists."

This distinction has long been recognized in Florida.

In *Lainhart v. Catts*, (1917) 73 Fla. 735, 75 So. 47, where the legislature had created a drainage district and imposed assessments without notice, the Supreme Court of Florida said:

> "There is a wide difference between a special tax or assessment for local improvements prescribed by the legislative body, having full authority over the subject, and one dependent upon the judgment and actions of bodies or instrumentalities acting under delegated powers."

See also: *Redman* v. *Kyle*, 76 Fla. 79, 80 So. 300.

Squarely in point, even to involving resurfacing as against original paving is *Sears et al.* v. *Mayor, etc., of Atlantic City et al.*, 73 N.J.L. 710, 64 Atl. 1062.

Secondly. The exact contrary to appellee's position was held by the Florida Supreme Court in this case. In discussing the necessity for and the sufficiency of the notice, the Court said in its first majority opinion (R. 33):

> "So to generate the power vested by the statute, the resolution must be adopted, and to secure *due process** to those who must pay the cost, or whose property will be responsible for it, the notice defined in the law must be given."

Even in the absence of this statement, it is obvious that the whole case revolved around this point. Until present counsel came into the case—which was not until after an appeal was taken to this Court—no argument to the contrary has ever been suggested.

Indeed the City's only real defense to the suit was that the property owners were estopped to contest the determination of benefits because they failed to appear in response to the notice by publication and to avail themselves of the administrative procedures which were thereupon made available. The City's main argument has always been that since the notice was valid the assessments were incontestable.

How could such a notice be invalid other than under the due process clause? It was never contended by the appellants that the notice was merely formally deficient. They contended that the notice was substantially deficient, a contention with which the trial court agreed when it found that the notice was "insufficient as a matter of law" for the reason, among others, that it was inserted in the Miami Herald in such a manner "that it cannot be said that any reasonable person was put upon notice by it that their

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*Emphasis herein supplied unless otherwise noted.

property was going to be subjected to a special assessment" (R. 23). This language echoes the thought, if not the words of Mr. Justice Jackson in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, and almost paraphrases the language of the Florida Supreme Court itself in a similar case involving a similar charter (*Rafkin* v. *City of Miami Beach*, 38 So. 2d 846), wherein the Court said that the notice in the newspaper was so intermingled "with other printed matter that one of ordinary mind would not be put on notice that his rights were in danger."

In *Mullane's* case, the Court said that "it would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the Courts."

Further in *Mullane's* case, the Court said:

> "Chance alone brings to the attention of even a local resident an advertisement in small type inserted on the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint."

Accordingly, the Court reversed the judgment because the requirement of the New York statute was "incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights."

Conclusive evidence that a federal constitutional question was raised is found in the complaint (R. 6, 7), which contained this allegation:

> "The special assessments sought to be imposed upon the abutting property owners in Highway Improvement District H-477 are illegal and void and constitute taking of property in violation of the Constitution of the United States and of the State of Florida, upon the following grounds:
>
> > 'The Notice was published in an inconspicuous place upon the Classified advertising section of the Miami Herald, a position in which it was least likely to attract the attention of persons such as the Plaintiffs and those on whose behalf this suit is brought.' "

Appellee chides us because the Constitution of the United States is mentioned only once in the complaint. The invocation of constitutional guarantees is not generally regarded as a form of incantation whose effectiveness increases with repetition. If the Constitution were a remote diety, intercession might require frequent supplicatory attitudes. Instead the Constitution is the law of the land, and its due process clause is an effective defense to all who resort to its protection against arbitrary state action. Due process of law is generally regarded as being the equivalent of the provision of Magna Carta regarding judgment *"per legem terrae,"* and as such was properly and timely used as a shield against unlawful municipal action here sought to be curbed. In the face of the elaborate briefs which were filed in the court below, it would be idle to pretend that the Florida Supreme Court was not aware that an attack was being made on the proceedings because they violated the due process clause of the Four-

teenth Amendment.[1] Such a contention also would do no credit to the learning and ability of the Justices of that august tribunal. The fact is that the Florida Supreme Court, necessarily by its actions, held that notice by publication to resident property owners on special assessment proceedings was sufficient as a matter of law. Such a holding is contrary to this Court's opinion and cannot therefore be sustained.

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1. In the property owners' first brief filed in the Supreme Court on September 13, 1955, we said (B. 18):

> "The City impliedly admits—as indeed it must—that in the imposition of special assessment liens, some form of notice to affected property owners is essential under the due process clause. It asserts, however, that the sufficiency of the notice in this case has been previously adjudicated by this Court, which, so it is said, ruled in a similar case that an identical notice was sufficient. The case so relied upon is *Escott* v. *City of Miami*, 107 Fla. 273, 144 So. 397.
>
> * * *
>
> In the *Escott case*, the Court indicated that such proceedings are judicial in nature; and that the property owner must have notice at some time before the final assessment is made in order to meet substantial requirements of due process of law.
>
> But the insufficiencies of the notice, which are hereafter pointed out, were not discussed in the Escott case and we do not believe the Court meant to pass upon them. The authorities—including those cited in the opinion itself—all hold that the notice is lacking in the essential requirements of law. It would be unfair to attribute to this Court an intention to run counter to these authorities."

In a brief filed on the occasion of the reargument on the City's petition for rehearing and prior to the last majority opinion, we said (B. 52):

> "The notice was insufficient and deceptively published. It was a form of process. Being so, it was subject to constitutional requirements of due process. Due process forbids constructive service on known residents. The assessment rolls disclose the names and addresses of each property owner. If tax bills could be sent by mail the notice of the City's intention to make the levy could also have been sent by this method."

Even if the Constitutional question were not explicit in the Court's opinion, the cases are legion which hold that a special assessment must be supported by special benefits and that in order for the assessment to be valid, the owner of the property assessed must have notice of the hearing on the determination of benefits and an opportunity to be heard.

McQuillin, Mun. Corp., Third Ed., Sec. 38.98.

Fallbrook Irrigation District v. *Bradley*, 164 U.S. 112.

Turpin v. *Simon*, 187 U.S. 51.

Londoner v. *City and County of Denver*, 210 U.S. 373.

Bellingham Bay & B. C. R. Co. v. *City of New Whatcom*, 172 U.S. 314.

Town of Monticello v. *Finlayson*, 154 Fla. 274, 17 So.2d 84.

City of Hollywood v. *Davis*, 154 Fla. 785, 19 So.2d 119.

Cited to the text in McQuillin are cases in 26 state jurisdictions.

In *Sears* v. *Mayor, etc., of Atlantic City*, 73 N.J.L. 710, 64 Atl. 1062, the Court, in a thoughtful and carefully worded opinion, discussed this question of benefits and notice and lucidly explained the reason for the conclusion that notice was essential to validity. The Supreme Court had held:

> "* * * that the ordinance was invalid, because it was passed without notice to those property owners who were affected by the provision which directed an assessment for benefits to be made. * * *"

The Court of Error and Appeals differentiated between the legislative act of a municipality in repairing streets in the performance of a municipal duty and the act of paving a street, not as a matter of ordinary repair, but upon specified conditions and when the burden was to have been

placed, not upon the public treasury but upon a specific class of individuals. The Court said that the soundness of the lower Court decision depended upon whether the ordinance providing for the improvement and assessment was judicial or legislative in character. The Court, quoting from an earlier case, said that this latter class of cases were judicial in their nature, adding:

> "'* * * With respect to this latter class the adoption of an ordinance directing the improvement to be made, is a judicial act affecting those individuals, and they are entitled to be heard before the ordinance is passed which adjudges the necessity or expediency of the proposed improvement, and directs it to be made.'"

In holding the Atlantic City ordinance which created the improvement district and decreed assessments to be made against the abutting property to be invalid, the Court concluded as follows:

> "* * * The question whether the benefit received was less than the burden imposed never has been considered as having any bearing in determining whether the ordinance which required the making of the improvement was legislative, or judicial, in its character. On the contrary, the fact that it imposes a burden upon the abutting land has been the only test, without regard to whether the benefit conferred was, or was not, an equivalent for the burden imposed. The test furnished by the rule must be accepted as an inherent part of the rule itself. Its application renders the ordinance under consideration invalid.
>
> The judgment of the Supreme Court must be affirmed."

In *Electric Short Line Term. Co.* v. *City of Minneapolis*, (Minn.) 64 N.W.2d 149, the Court passed upon a situation closely analogous to that presented here. The facts in the cited case are relatively simple. The Electric Short Line

Term. Co. owned property which abutted upon 7th Street and 3rd Avenue. These streets intersected each other at right angles at plaintiff's property. The City adopted a resolution which changed the grade of that portion of 7th Street which constituted the approach to the 7th Street bridge. The property owners sued the City for damages caused by raising the grade of the street and eliminating the intersection. The City asserted as a defense that the plaintiff had failed to resort to the sole and exclusive remedy which was provided for by the City Charter and were therefore barred. This administrative remedy, among other requirements, contained one which based a right to compensation in those who had filed notices within a 20-day period fixed by the Charter. The lower Court struck the part of the answer asserting such defense, and the City appealed.

The Supreme Court affirmed, saying:

> "Does the remedy provided by c. 8, § 2, contain the essential element of *adequate* notice to the abutting property owners? If adequate notice is to be found therein it must be on the theory that a legislative act which directly exercises the power of eminent domain by appropriating private property to a future public use, is a public act of which, like other legislative enactments of general application, every citizen is presumed to have knowledge and therefore notice. This theory was adopted in the majority opinion of State v. Messenger, supra, and was confirmed in State v. Bruggerman, 31 Minn. 493, 18 N.W. 454. In the Messenger case, which upheld a special legislative enactment appropriating private property to a public use and subjecting the owner to a forfeiture of his constitutional right to compensation unless a claim for damages was made within 60 days of the passage of the act, Mr. Chief Justice Gilfillan dissented, pointing out that it is fallacious to hold that the presumption that

everybody knows the law supplies adequate constructive notice since the property owner would reasonably learn of the enactment only by sheer chance. The presumption that every citizen knows the law is nothing more than a restatement of the principle that ignorance of law is no excuse for noncompliance. Clearly such presumption is an illusory substitute for the notice required in eminent domain proceedings to apprise an owner of the invisible appropriation of his property to a future public use so that he may fairly be forewarned that he will lose his constitutional right to compensation if he fails to act within a prescribed period.

The unsoundness of this theory becomes strikingly apparent as it is exemplified in the instant case. Chapter 8, § 2, by explicit language purports to terminate completely an abutting owner's right to compensation unless such owner within 20 days after the city council *has voted* (not 20 days after the first publication of the resolution) to change the street grade actually files a notice of claim with the city clerk. A city council vote can only be effective as notice to the average property owner on the unrealistic assumption that by some process of intuition he is promptly informed when the council takes action which affects his particular property. As a prerequisite to the commencement of the 20-day limitation period, c. 8, § 2, contains no provision whatever for constructive notice to the property owner by publication or by the posting of any appropriate notice. All provisions therein for constructive notice by publication relate to hearings held subsequent to the expiration of the time for filing claims.

* * *

In recognizing that the mere enactment of a statute appropriating private property is not of itself such constructive notice as will start the running of a statute of limitations period during which the property owner must assert his right to compensation, Mr. Justice Cardozo said:

"* * * Before the citizen's right to compensation can be cut off by such a statute of limitation, notice of the event on which the right depends must be brought home to him by the state. He cannot be charged with the duty of hunting out the facts for himself. The state is appropriating his property by proceedings *in invitum*, and it cannot shift upon him the burden of ascertaining that the proceedings are in motion. It must give him notice reasonably adapted to bring their pendency to his attention.' Matter of City of N. Y. (Grand Boulevard), 212 N.Y. 538, 544, 106 N.E. 631, 632.'"

2. The Timely Raising of the Federal Constitutional Question.

The argument under this question unavoidably spilled over into the first, but we shall try to avoid repetition. The contention that the basic question was not raised is almost an affront to all of those (the Chancellor, the Justices and counsel on both sides) who have been participating in these cases for nearly six years. To be told now that the main question was never raised, argued or decided leaves us astonished and dismayed.

The fact is that in the City's assignments of error (3, 4 and 5) in the Florida Supreme Court, it was asserted that (R. 26):

"3. The Chancellor erred in finding that the *Notice* of Hearing of Objections to the Confirmation of the Resolution ordering Highway Improvement District H-477 was *insufficient as a matter of law.*

4. The Chancellor erred in finding that the Notice was insufficient because it was inserted in the classified section of the 'Miami Herald'.

5. The Chancellor erred in finding that any reasonable person was not put upon notice that their property was to be specially assessed."

The Florida Supreme Court agreed with this and held in its majority opinion that (R. 35):

> "On the matter of the validity of the notice we must disagree with the chancellor, and by disagreeing, we cannot adopt the view that the property owners could ignore the notice and at this late date successfully attack the action of the city, *on the ground that due process had not been afforded them.*"

Here is a definite, pin-pointed recognition of the property owners' complaint and the extent of the trial court's finding. Its specificity should satisfy the most captious.

This statement should be a sufficient answer to appellee's brief (4) that on the "first majority opinion written by the Florida Supreme Court (R. 32-41) there was no discussion of any constitutional question either State or Federal."

As to the appellee's further statement that the second majority opinion did not discuss any constitutional question whatsoever, its counsel has evidently overlooked the quotation (R. 51) that:

> "If the property owner had notice, and in this case we have held that he did have, his only method of questioning any error or irregularity in the proceedings was by filing objections before the city commission, and, if overruled there, by filing his special appeal to the circuit court in the manner provided by the charter."

What the City is apparently unable to accomplish is to equate the necessity for notice with the requirements of due process of law. We thought that Webster had long ago settled that difficulty with his famous aphorism that linked "hearing" inseparably with "determination." But who can be heard without notice?

Yet even if we accepted appellee's view that this basic constitutional question was not raised in the complaint, in the decree and in the opinions, there is no doubt that in the appellants' petition for rehearing they made it abundantly clear that the opinion had transcended constitutional limits and transgressed opinions of this court. This petition asserted (R. 65):

> "4. In holding the notice of the confirmation of assessment roll sufficient, and that the appellees were estopped to challenge the lack of benefits because they failed to object pursuant to the notice, the Court overlooked, or failed to consider that the procedure for the imposition of assessment liens is quasi judicial and that the requirements of procedural due process guaranteed by Amd. XIV, U.S. Const., must be complied with. In the case of residents, constructive notice, as attempted is violative of the rights secured by such amendment."
>
> *Walker* v. *City of Hutchinson*, 352 U.S. 112.
>
> *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306.

That the Court was impressed is evident by the order which allowed a brief to be filed confined to the questions so raised.

Also significant is the vote that followed. When the court first heard the case, the majority spoke through Thomas, J., with Terrell, C.J., and Roberts and Thornal, J.J., concurring. Drew, O'Connell and Hobson, JJ., dissented. On the City's petition for rehearing, Drew, O'Connell, Hobson and Thornal voted to grant. They later reversed the decree previously affirmed. Terrell, C.J., Thomas and Roberts, JJ., dissented. When the property owners petitioned for rehearing, Thomas and Roberts, J.J., stood firm. Terrell, C.J., voted to deny, *but* Hobson, J., voted with Thomas and Roberts, J.J., to grant (R. 71). In

the long course of these proceedings, the Chief Justice and Justices Thomas, Hobson, Roberts and Thornal have, at one time or another, agreed with appellants' contention. Three opinions were written on the first hearing and two on the rehearing. That so much effort and such contrariety of opinion was about so little belies the City's contention.

So, even if appellee were correct (which it is not) in its contention that the federal constitutional question was not raised until the property owners petitioned for rehearing, still the question was raised then, and case after case holds that this is time enough.

Saunders v. *Shaw*, 244 U.S. 317.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673.

State of Missouri ex rel. Missouri Ins. Co. v. *Gehner, Assessor*, 281 U.S. 313.

Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 156.

Especially is the fact that the timely raising of the federal constitutional question not open to argument here when there is considered the fact that the Court permitted the property owners to file a brief on the petition for rehearing confined solely to the federal constitutional question presented by the petition for rehearing (R. 70).

Florida Appellate Rule 3.14 does not provide for the filing of briefs on such petition and indeed prohibits the making of argument in the petition. Hence the necessity for obtaining leave so to do (R. 69).

This should sufficiently answer both of appellee's contentions. For the sake of completeness, however, there are a few statements in appellee's brief which require a direct response.

Appellee says (B. 4):

> "Upon the appeal to the Supreme Court of Florida, and under the first majority opinion written by it (R. 31-41), there was no discussion of any constitutional question either State or Federal. *This opinion held in substance that the notice was valid* and substantially conformed to the statute (R. 35), that *the court could not agree with the trial court, that there was no benefit to the property owners* (R. 35), but that the City had no authority to levy the assessments under its Charter (R. 36), and therefore, the judgment of the lower court would be affirmed."

The above statement is inconsistent with the basic position taken by the City to the effect that the Supreme Court did not pass upon the question of notice.

The second emphasized portion of the above statement is not in harmony with the record. The Court, in the first opinion, said (R. 35):

> "We can understand the potency of an argument that once a street is paved the cost of maintaining it should be borne by the public. Although we cannot agree that keeping a street in good repair is of *no special benefit whatever* to the property it bounds, we think that the power to maintain and assess the cost to adjacent property must be found in the charter, and in our search we have not discovered that the municipality was granted the power to 'resurface' and assess the costs as in the case of original or new construction."

The concluding sentence in the paragraph from which the above quotation is taken is as follows (R. 36):

> "The total application consisted of a coating an inch and a half in thickness, and when this work is considered with the nature of a street, it seems to us that the circuit judge was not illogical in his holding

that the layers were to make smoother a street worn by traffic, and that the improvement was in effect maintenance as distinguished from construction or *re*-construction." (emphasis not supplied).

Having determined that the work which the City did was *resurfacing* as opposed to *reconstruction*, the first majority opinion then concluded that the City lacked authority to assess for resurfacing.

But as we have said above, one of the justices (Thornal) filed a specially concurring opinion (R. 37), in which he said that the record abounded in evidence more than adequate to sustain the trial judges' finding that the work was for the benefit of the general public. Certainly the watered-down statement that the Court understood the potency of the argument and the conclusion that the Circuit Judge was not illogical in his holding is a long way from overturning the direct finding by the Circuit Court that the work conferred a special benefit upon the abutting property. What the Court in effect was saying was that the property owners' argument, that under no circumstances could resurfacing be a special benefit, was impressive but not convincing.

Appellee then makes reference to the property owners' petition for rehearing, saying:

> "* * * The said paragraph 2 stated that lack of notice of the confirmation of the assessment roll was violative of procedural due process and the appellants should not be estopped. This paragraph totally disregards the facts found by the majority final opinion of the Appellate Court on estoppel showing the suit was filed more than a year after the assessments and showing other notices as to the improvements and as to confirmation of the roll without any objections filed (R. 50-51 note at bottom of pages)."

The statement that the suit was filed more than a year after the assessments were made is not true. The City's answer alleged (R. 13):

> "* * * Defendant further alleges that plaintiffs and each of them and each of those persons whom they purport to represent failed to file *within ten days from the confirmation of the assessment roll* fixing assessments complained of in the Amended Bill of Complaint, their written verified petition in the office of the Clerk of the Circuit Court in and for Dade County, Florida, in conformity with Section 56(n) of the said City Charter, * * *"

The Hamilton suit was filed within 48 days after the assessments were confirmed, and the Ganger suit was filed within 57 days after the confirmation.

The confirming Resolution in the Hamilton case (H-477) was adopted on March 18, 1953 (Appendix to Appellants' Brief 18, 19). The complaint was filed on May 5, 1953. The City filed a motion to dismiss, which was denied, and an appeal was taken to the Supreme Court of Florida where the order was confirmed on October 6, 1953. *City of Miami* v. *Hamilton*, Fla., 67 So.2d 430.

In the Ganger case (District H-503), the assessments were confirmed on February 18, 1954 (Appendix to Appellants' Brief 13), and the suit was filed April 1, 1954.

Appellee has evidently confused the filing of the Ganger suit with the confirmation of the assessment liens in the Hamilton case, an oversight which we are sure was unintentional.

The broad statement is made (B. 10) that the Appellants in their brief have not seen fit to cite any cases involving special levies for local improvements or involving taxation in any of its phases.

This statement is likewise incorrect. *New York* v. *N. Y., N. H. & H. RR. Co.*, 344 U.S. 293, involved a special assessment levied by the City of New York against the property of the railroad company. The bankruptcy court barred the city's claim against the enforcement of the assessment lien because it failed to respond to a publication of a notice in local newspapers. The Court held that service by publication against a local municipality was a denial of due process of law.

The case of *Wisconsin Electric Power Company* v. *City of Milwaukee*, 352 U.S. 948, is directly in point. In this case, the Power Company sued to enjoin the enforcement of special assessment liens which was exactly what was done in the case at bar. The gravamen of the complaint was that notice of the confirmation of the assessment was only such by publication, hence the liens were void. The Supreme Court of Wisconsin affirmed an order sustaining a demurrer to the complaint. The headnote of that Court is as follows (*Wisconsin Electric Power Co.* v. *City of Milwaukee*, 263 Wis. 111, 56 N.W.2d 784):

> "In action to set aside special assessments levied by defendant city against right-of-way properties of plaintiff electric power company, order sustaining demurrer to complaint on ground that notices of hearing, given by publication only, as required by city charter, were adequate to comply with due process requirements, was affirmed by equally divided court."

The Power Company filed an amended complaint in the Circuit Court. This was dismissed. A second appeal was taken. Again the Court affirmed saying (*Wisconsin Electric Power Co.* v. *City of Milwaukee*, 272 Wis. 575, 76 N.W.2d 341):

> "The amended complaint does not differ in any material respect from the original complaint, nor does

appellant contend that it does. It presents to us the identical issue which we considered and determined in Wisconsin Electric Power Co. v. Milwaukee, 1953, 263 Wis. 111, 56 N.W.2d 784. The reason for this appeal appears to be that since the first one the Supreme Court of the United States has considered once more the sufficiency of notice given by publication and in City of New York v. New York, N. H. and H. Ry. Co., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333, has affirmed and somewhat strengthened the principle it announced in Mullane v. Central Hanover B. & T. Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (referred to in our former opinion, 263 Wis. 111, 112, 56 N.W.2d 784), namely, that when more certain means of communication are reasonably available, notice by publication is insufficient to meet the demands of due process of law. In effect, appellant does no more than to ask us to reconsider, in the light of this more recent authority, our previous decision that the notice of special assessments given by the city by publication did not offend constitutional requirements."

This time the Power Company appealed to this Court which noted probable jurisdiction and remanded the cause for further consideration in the light of the decision in *Walker* v. *City of Hutchinson*, 352 U.S. 112. This time the Wisconsin Court reversed the Circuit Court decree saying (*Wisconsin Electric Power Company* v. *City of Milwaukee*, 275 Wis. 121, 81 N.W.2d 298):

"In view of the determination made by the United States supreme court we hold that the constructive notice given by the defendant city by publication of the proposed special assessments against the plaintiff's lands did not meet the requirements of due process. Mullane v. Central Hanover B. & T. Co., 1950, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and Walker v. City of Hutchinson, 1956, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed. 2d 178. Therefore, it was error for the trial court to

have sustained the general demurrer interposed to plaintiff's amended complaint."

No case could possibly be found which is closer in point than this.

Yet, strong as this authority is, the cases at bar present a situation which cries out even more loudly for attention. We ask the Court to consider these factors:

1. The Complaint alleged that the notice by publication was given and that the property owners did not appear in response to it and file objections to the assessments.

2. The Circuit Court of Dade County held that the complaint stated a cause of action.

3. The Supreme Court of Florida (*City of Miami* v. *Hamilton*, Fla., 73 So.2d 715) affirmed the lower court.

4. By this act the law of the case was established. In Florida (as well as in Wisconsin) a determination of law on a prior appeal establishes the law of the case and puts it beyond the power of the court to overturn such decision on a subsequent appeal of the same case. *Hamel* v. *Danko*, Fla., 82 So.2d 715.

5. On remand, the Circuit Court tried the suits and decided the facts in favor of the property owners. The law had already been decided on the prior appeal.

6. This decree was rendered on February 16, 1955, which was nearly two years before this Court decided *Walker* v. *City of Hutchinson* and *Wisconsin Electric Power Co.* v. *City of Milwaukee*. These decisions were handed down in December, 1956.

7. The first majority opinion affirming the final decree was filed on January 30, 1957, only a few weeks after the Wisconsin Electric Power Co. case.

8. *Walker* v. *City of Hutchinson* was called to the Florida Supreme Court's attention by brief filed on May 28, 1957.

9. This was at or just prior to the oral argument on the City's petition for rehearing which had been granted.

10. In the face of these considerations, the Florida Supreme Court reversed the decrees.

So, the Florida Supreme Court committed two egregious errors. One—it refused to adhere to its own rule with respect to the law of the case and two—it refused to follow this Court's decisions with respect to the validity of service by publication on resident property owners. The Wisconsin Supreme Court at least genuflected in the direction of consistency—it refused to reexamine its prior holding in the Wisconsin Electric Power case on the principle of law of the case from which the inference is warranted that reexamination might have brought reversal. Here the Florida Supreme Court deviated from its own holding and thereby compounded its error.

The due process clause is no abracadabra. It is a forceful and vital statement of principles. Its phraseology has the simplicity of all great writings. The injunction laid upon the States is that they shall not "deprive any person of life, liberty or property without due process of law." In these cases, liens totalling better than One Hundred Thousand Dollars have been imposed on the property of unsuspecting citizens whose efforts to show a lack of corresponding benefits are met with the statement that they had notice and failed to object. But what kind of notice? A small advertisement tucked away among others on the classified advertising page of a large metropolitan newspaper. This, as Justice Jackson observed in the *Mullane* case, when "weighing its sufficiency on the basis of equiva-

lence with actual notice," can hardly be regarded "as more than a feint."

The judgments of the Supreme Court of Florida should be reversed.

Respectfully submitted,

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and

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CLYDE A. EPPERSON,
Ingraham Building,
Miami 32, Florida,

and

ANDERSON & NADEAU,
908 First National Bank Building,
Miami 32, Florida,
Attorneys for Appellants.

I, THOMAS H. ANDERSON, one of the attorneys for the appellants herein, and a member of the Bar of the Supreme Court of the United States, certify that on the ... day of February, 1959, I served a copy of the foregoing Appellants' Reply Brief on the City of Miami by mailing a copy in a duly addressed envelope with sufficient postage prepaid to carry the said Reply Brief to MILTON M. FERRELL, Attorney for Appellee, Five Fifty Building, 550 Brickell Avenue, Miami 32, Florida.

---,

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Miami 32, Florida,
Attorney for Appellants.

FILED
APR 1 1959
JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 153

NORTON R. GANGER, L. C. BETHART, THOMAS B. HAMILTON ET AL.,
Appellants,

vs.

CITY OF MIAMI, A MUNICIPAL CORPORATION,
Appellee.

Appeal from the Supreme Court of the State of Florida

PETITION FOR REHEARING

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IN THE

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Appellee.

Appeal from the Supreme Court of the State of Florida

PETITION FOR REHEARING

The Court, in ordering the dismissal of these appeals upon the ground that the appellants had failed properly to raise a substantial federal question, overlooked or failed to consider the following, severally:

THE FEDERAL QUESTION WAS TIMELY RAISED BY PETITION FOR REHEARING IN THE STATE SUPREME COURT.

This Court has held that the raising of a federal question is timely if raised at the first opportune time,

even if it be upon petition for rehearing in the State Court where the decree, favorable to the appellants up to that point, was reversed in the State Supreme Court.

Saunders v. *Shaw*, 244 U. S. 317.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673.

State of Missouri ex rel. Missouri Ins. Co. v. *Gehner, Assessor*, 281 U. S. 313.

Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 156.

The appellants' Petition for Rehearing in the State Court averred (R 65):

> "4. In holding the notice of the confirmation of the assessment roll sufficient, and that the appellees were estopped to challenge the lack of benefits because they failed to object pursuant to the notice, the Court overlooked, or failed to consider that the procedure for the imposition of assessment liens is quasi judicial and that the requirements of procedural due process guaranteed by Amd. XIV U. S. Const. must be complied with. In the case of residents, constructive notice, as attempted, is violative of the rights secured by such amendment.
>
> *Walker* v. *City of Hutchinson*, 77 S. Ct. 200; *Mullane* v. *Central Hanover Bank & Trust Co. et al.*, 339 U. S. 306."

This was presented as one of the questions to this Court in the Notice of Appeal (R 75).

This point was commented on by Mr. Justice Stewart, who observed, in the course of oral argument, that the first occasion upon which there was need for appellants to have raised the federal question, was when the Supreme Court of Florida, on the City's Petition for Rehearing, reversed itself, as well as the decree of the Circuit Court.

THE COURT WAS OBLIGATED TO TREAT THE APPEAL AS A PETITION FOR CERTIORARI.

28 U.S.C.A. 2103 provides in part as follows:

"If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. * * * "

In *Hanson* v. *Denckla,* (1958) 357 U. S. 235, this Court, on an appeal from the Supreme Court of Florida, just as here, postponed until a hearing on the merits the question of jurisdiction. Upon a hearing on the merits this Court dismissed the appeal for want of jurisdiction, but treated the appeal as a certiorari granted, saying:

" * * * Accordingly, we are without jurisdiction of the appeal and it must be dismissed. *Wilson* v. *Cook,* 327 U. S. 474, 482, 66 S. Ct. 663, 667, 90 L. Ed. 793; *Charleston Fed. Sav. & Loan Ass'n* v. *Alderson,* 324 U.S. 182, 65 S. Ct. 624, 89 L. Ed. 857. Treating the papers whereon appeal was taken as a petition for certiorari, 28 U.S.C. § 2103, 28 U.S.C.A. § 2103, certiorari is granted."

The footnote to the above case reads as follows:

"The record discloses no mention of the state statute *until the petition for rehearing in the Florida Supreme Court.* In the trial court, appellant's motion to dismiss raised the federal question in this manner: 'The exercise by this Court of the jurisdiction sought to be invoked by the plaintiffs herein would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and, in particular, Section 1 of the Fourteenth

Amendment to the United States Constitution.' No. 107, R. 41." (Emphasis supplied)

The Amended Complaint raised the federal question in the trial court, alleging (R 6):

"The special assessment liens sought to be imposed upon the abutting property owners in Highway Improvement District H-477 *are illegal and void and constitute taking of property in violation of the Constitution of the United States* and of the State of Florida, upon the following grounds: * * * " (Emphasis supplied)

See also: *Knapp* v. *Schweitzer,* 355 U. S. 804.

This appeal should be treated as a certiorari under Section 2103 because the decision of the Supreme Court of Florida is directly contrary to this Court's recent decision in *Wisconsin Electric Power Company* v. *City of Milwaukee,* 352 U. S. 948, 274 Wis. 121, 81 N. W. (2) 298, which is squarely in point. The State Court decision is also contrary to *Mullane* v. *Central Hanover Bank & Trust Company,* 339 U. S. 306; *Walker* v. *City of Hutchinson,* 352 U. S. 112; *New York* v. *New York, N. H. & H. R. Co.,* 344 U. S. 293; and *Lambert* v. *California,* 355 U. S. 225.

THE SUPREME COURT OF FLORIDA NECESSARILY PASSED UPON THE FEDERAL CONSTITUTIONAL QUESTIONS RAISED BY THE PETITION FOR REHEARING.

The majority opinion of the Supreme Court of Florida on rehearing granted was predicated upon a single proposition, viz: that the property owners were estopped to challenge the assessments because they failed to file their suit within twenty (20) days of the confirmation of the assessment roll (R 51).

In the opinion of the Supreme Court of Florida, written by Thomas, J., which thereafter became the minority opinion, he said (R 33):

"So to generate the power vested by the statute, the resolution must be adopted, and to secure due process to those who must pay the cost, or whose property will be responsible for it, the notice defined in the law must be given."

Justice Thornal wrote a specially concurring opinion in which he said that he would affirm the lower Court decree upon the ground that the record abundantly supported the Chancellor's finding of a complete lack of special benefit to the abutting property owners. The City of Miami, in its Petition for Rehearing, directed a specific ground to Justice Thornal. The City said (R 43):

"In this connection, Justice Thornal overlooked or failed to consider that if, in making special assessments, due notice was accorded the property owners by the City of Miami as required by the Charter as held in the opinion of Justice Thomas, then in that event all provisions of organic law that pertain to due process were complied with. * * *"

Quite significantly it was Justice Thornal who voted to grant the City's Petition for Rehearing, resulting in the decision complained of. The majority of the Court on rehearing, joined by Justice Thornal, said (R 51):

"* * * In *Escott* v. *City of Miami,* 144 So. 397 (Fla. 1932), in speaking of this identical section of the city charter, after holding the original notice to have been validly given, we said:

'If the property owner had notice, and in this case we have held that he did have, his *only* method of questioning any error or irregularity in the proceedings was by filing objections before the city commission, and, if overruled there, by filing his special appeal to the Circuit Court, in the manner provided by the charter.'

" 'Where a property owner has an opportunity given him, under a statute providing for special assessments for local improvements, to appear

> and contest the question before the local authorities whose duty it is (fol. 54) to pass upon objections, *their determination on the subject of benefits is final, and, if he fails to avail himself of the opportunity provided by the statute, he thereby admits the finality of the determination, and is estopped to raise the question in subsequent proceedings, such as by suit in equity to enjoin the enforcement of assessments which have become conclusive under the statute'.*" (Emphasis supplied)

In order to have the principles of estoppel operate notice is an essential element. How could the property owners be estopped because they failed to file suit within 20 days if they had no notice as to when the 20 day limitation period was tolled, or notice that special assessments were going to be levied against their properties? The Court necessarily determined that the notice by publication was legally sufficient under the Fourteenth Amendment, otherwise it could not have predicated its opinion upon estoppel.

This Court has repeatedly held that even though the opinion of highest State Court does not expressly recite or evidence consideration of a federal question, jurisdiction will be entertained where the decision in the State Court necessarily required it to have passed upon the federal question.

> *Wilson* v. *The Black Bird Creek Marsh Company*, 2 Pet. 245, 250.
>
> *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 579.
> *Eureka Lake & Yuba Coal Co.* v. *Superior Court*, 116 U. S. 410.

If it were otherwise, the State Courts could simply refusing to recognize the problem, or by "dodging" the issue regulate and determine this Court's jurisdiction.

See: *McCullough* v. *Commonwealth of Virginia*, 172 U. S. 102, 117.

THE CHARTER REQUIREMENT THAT PROPERTY OWNERS FILE SUIT WITHIN TWENTY DAYS OF CONFIRMATION OF THE ASSESSMENT ROLL VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT UNITED STATES CONSTITUTION.

That Petition for Rehearing also alleged that the time allowed by the City Charter was so short as to violate the Due Process Clause of the Fourteenth Amendment to the Federal Constitution (R 64):

> "2. In holding that the property owners were estopped to attack the assessments for want of benefits, because they did not file their action in the Circuit Court within the time fixed by the Charter (10 or 20 days), the Court overlooked the fact that the property owners never had notice of the (fol. 68) confirmation of the assessment roll, and therefore had no notice of when the time for following the statutory procedure began to run. Such lack of notice is violative of procedural due process. Amd. XIV U. S. Const."

This question was likewise presented to this Court by the Notice of Appeal (R 76).

The Petition for Rehearing averred that the Charter requirement that the property owners file suit within twenty (20) days of confirmation of the assessment roll violated the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. This is particularly true where the property owners had *no notice as to when the time began to run against them.*

A similar twenty day provision in an analogous case was held to be unconstitutional by the Supreme Court of Minnesota in *Minnesota Electric Short Line Terminal Co.* v. *City of Minneapolis,* 64 N. W. (2) 149.

For the reasons stated the cause should be reheard and the judgment of the Supreme Court of Florida reversed.

Respectfully submitted,

_____

Clyde Epperson,

_____

Herbert L. Nadeau,

_____

Thomas H. Anderson.

CLYDE EPPERSON,
Ingraham Building,
Miami 32, Florida,

ANDERSON & NADEAU,
508 First National Bank Building,
Miami 32, Florida,

Attorneys for Appellants.

CERTIFICATE OF GOOD FAITH AND SERVICE

I, Thomas H. Anderson, one of the attorneys for the appellants herein, and a member of the Bar of the Supreme Court of the United States, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay. I further certify that on the ..... day of ....., 1959, I served a copy of the foregoing Petition for Rehearing on the City of Miami by mailing a copy in a duly addressed envelope with

sufficient postage prepaid to carry the said Petition to Milton M. Ferrell, the City Attorney for the City of Miami, Five Fifty Building, 550 Brickell Avenue, Miami 32, Florida.

THOMAS H. ANDERSON,
508 First National Bank Building,
Miami 32, Florida,

Attorney for Appellants.

GANGER ET AL. *v.* CITY OF MIAMI.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 153. Argued March 2–3, 1959.—Decided March 9, 1959.

Appeal dismissed for want of a properly presented substantial federal question.

Reported below: 101 So. 2d 116, 123.

Thomas H. Anderson and *Herbert L. Nadeau* argued the cause for appellants. With them on the brief was *Clyde Epperson.*

Milton M. Ferrell argued the cause and filed a brief for appellee.

PER CURIAM.

The appeal is dismissed for want of a properly presented substantial federal question.